

“Something Old, Something New, Something Borrowed, Something Blue”:¹ Recent Developments in Pretrial and Trial Procedure

Major Gregory B. Coe
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

In 1996, the membership of the Court of Appeals for the Armed Forces (CAAF) changed with the addition of another associate judge.² The new membership raised many questions, mainly, would the court's disposition on key issues change? Would the court establish a new direction for military justice?

The major pretrial and trial procedure cases from 1996 provided just a glimpse of the trail the court is blazing for military justice. In 1997, however, the courts were more productive. The CAAF and intermediate service courts resolved many issues that affect the way practitioners execute their missions. In addition, contrary to the 1996 cases, the 1997 pretrial and trial procedure cases are of truly “landmark” proportion.³ The new CAAF and the intermediate service courts mixed “something old, something new, something borrowed, and something blue” to provide a clear statement of the law in pretrial and trial procedure.

This article reviews recent developments in the law relating to Article 32 investigations, pleas and pretrial agreements, court-martial personnel, and voir dire and challenges. Not every recent case is discussed; only those that establish a signif-

icant trend or change in the law are considered. Practical ramifications for the practitioner⁴ are identified and discussed.

SOMETHING OLD

Article 32 Investigations: Still at the Forging Stage

The most significant development in the area of Article 32 investigations in 1996 involved the Air Force Court of Criminal Appeals successfully focusing the CAAF's 1995 evisceration of the 100-mile situs rule.⁵ One might conclude that there is not much that is more controversial than the 100-mile situs test in this area of the law. One case shows that the law of Article 32 investigations is still in the forging stage.

Murder, Lesbian Duress, and McKinney: Retreat from Fatal Vision

In *MacDonald v. Hodson*,⁶ the famous court-martial case involving Captain MacDonald's murder of his wife and children, and inspiration for the book *Fatal Vision*,⁷ the Court of Military Appeals considered whether an Article 32 investiga-

1. “Something old, something new, something borrowed, something blue.” This is a traditional wedding rhyme that was first quoted in an 1883 English newspaper and was attributed to “some Lancashire friends.” In order to start a marriage successfully, a bride had to mix something old, something new, something borrowed, and something blue, and have a sixpence for her shoe. “Something old” protected a baby. There is no cited history to explain “something new.” A bride who wore “something borrowed” (something that a happy bride had already worn) was lucky. A bride who wore blue expressed faithfulness. The “lucky sixpence” produced prosperity or warded off evil from disappointed suitors. See A DICTIONARY OF SUPERSTITION 42-43 (Iona Opie et al. eds, 1989).

2. Associate Judge Andrew W. Effron joined to court to fill a vacancy left open when Judge Wiss passed away in October 1995. Judge Effron brings to the CAAF a background rich in military legal experience. After graduating from the 80th Officer Basic Course, The Judge Advocate General's School, United States Army, he was a trial and defense counsel at Fort McClellan, Alabama. He then served with the Office of the Department of Defense General Counsel while in uniform and then as a civilian attorney-advisor. As counsel, general counsel, and then minority counsel to the Senate Armed Services Committee from 1987-1996, he was involved in the most significant legislative changes affecting the military justice system. His wealth of experience and knowledge of the intent behind the 1984 *Manual for Courts-Martial* and law and regulations of all of the services will have a pivotal impact on the deliberations and opinions of the CAAF.

3. Even the intermediate service court cases possess landmark qualities, considering that they analyze an issue that was not completely resolved by the CAAF but remains critical to the continued vitality of the military justice system. In the significant cases from 1996, for the most part, the courts interpreted a recent case that espoused a new statement of the law. As such, there was no particularly new statement of black letter law, but an interpretation that established a mild twist in the application of that black letter law. See generally Major Gregory B. Coe, *Restating Some Old Rules and Limiting Some Landmarks: Recent Developments in Pre-Trial and Trial Procedure*, ARMY LAW., Apr. 1997, at 25.

4. The term “practitioner” includes all judge advocates in the military justice system. The 1997 cases contain lessons for staff judge advocates, appellate military judges, military judges, defense counsel, and trial counsel.

5. See *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(g)(1)(a) (1995) [hereinafter MCM].

6. 42 C.M.R. 184 (C.M.A. 1970).

tion could be closed to the public. In response to the investigating officer's (IO) order closing the Article 32 investigation, Captain MacDonald filed a petition for extraordinary relief. The Court of Military Appeals denied the writ, holding that under applicable regulation the investigating officer was within his authority in closing the investigation.⁸ More importantly, the court held that the Article 32 investigation was not a trial within the meaning of the Sixth Amendment to the Constitution, and there was no requirement that the proceedings be public.⁹

The "*Fatal Vision*" closure rule stood for twenty-seven years¹⁰ until the Air Force court signaled its death knell in *San Antonio Express-News v. Morrow*.¹¹ In *San Antonio Express-News*, the court tackled whether it should grant an extraordinary writ of mandamus and order an Article 32 IO to reverse a closure decision which barred the press and public from an Article 32 investigation. The accused was charged with the

murder of an eleven-year-old girl who had been missing for six years. The circumstances surrounding the case piqued the interest of the local press.¹² When the Article 32 was finally held in May 1996, the government requested that the investigation be closed to the press and public.

The IO granted the government request for the following reasons: "a need to protect against the dissemination of information that might not be admissible in court; to prevent against the contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the complete candor of witnesses called to testify at the hearing."¹³ *San Antonio Express-News*, the local newspaper, appealed to the Air Force Court of Criminal Appeals.¹⁴

Presented with a case of first impression¹⁵ involving the interpretation of Rule for Courts-Martial (R.C.M.) 405(h)(3),¹⁶ the court determined that all it was required to do to resolve the

7. JOE MCGINNISS, *FATAL VISION* (1983).

8. The provision in question was from *Army Regulation 345-60*. Paragraph 2 provided: "This regulation also provides guidelines for the release of information to the public which might prejudice the rights of an accused." *MacDonald*, 42 C.M.R. at 184. Paragraph 4 prohibited the release of information "before evidence thereon has been presented in open court." *Id.* The investigating officer originally granted Captain MacDonald's request for an open hearing. The investigating officer reversed his decision, despite Captain MacDonald's oral and written waiver of the protections of the regulations. The Judge Advocate General of the Army then denied Captain MacDonald's request for relief, but approved a recommendation that Captain MacDonald's mother be permitted to attend the hearing. *Id.* at 184-85.

9. *Id.* at 185. The court specifically noted:

The article 32 investigation partakes of a preliminary judicial hearing and of the proceedings of a grand jury However, the investigating officer has no authority to appoint counsel, but must refer a request for such appointment to the appointing authority who then acts upon it However, finality does not attach to the investigating officer's recommendations; it is advisory only . . . in certain limited circumstances, such testimony may be admissible as previously reported testimony . . . strict rules of evidence applicable at trial are not followed. Rather testimony and other evidence of all descriptions normally will come to the attention of the investigating officer, some germane to the charges before him; and others of no material significance whatever; some will implicate the accused, and some will fail to do so, while tending to implicate others not then under charges. In making his report, it is the officer's responsibility to cull from his final product all extraneous matters and present only such evidence as in his opinion will be admissible at trial. Regulation 345-60 curtails the release of such information to the public in order to reduce the possibility of prejudice to the accused subject, and others not charged.

Id.

10. Prior to 1984, the *Manual for Courts-Martial (MCM)* did not contain guidance on the factors to use in deciding whether an Article 32 investigation should be closed. In 1984, the *MCM* was reissued. It contained a specific reference to public access at Article 32 investigations. Rule for Courts-Martial (R.C.M.) 405(h)(3) provides: "Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." *MCM*, *supra* note 5, R.C.M. 405(h)(3). It is interesting to note that the analysis to the provision states that the basis for the rule is *MacDonald*. *See id.* R.C.M. 405(h)(3) analysis, app. 21 at A21-25. Citing R.C.M. 806 for circumstances which might support closure, the analysis to R.C.M. 405(h)(3) concludes by indicating that the new rule in no way expresses a preference for closed or open hearings. *See id.*

11. 44 M.J. 706 (A.F. Ct. Crim. App. 1996), *petition for extraordinary relief filed*, 45 M.J. 88 (1997).

12. *Id.* at 707. During the six-year period, the victim's disappearance was highly publicized, presumably in an attempt to locate her remains or finally to determine her whereabouts.

13. *Id.* at 708. The Article 32 IO was very careful, and she received excellent advice from her legal adviser (or she was a judge advocate). Although the investigation was closed to spectators, the IO specifically emphasized to both government and defense counsel that closure did not preclude either from disclosing what occurred during the hearing. Moreover, the closure action neither foreclosed the accused from taking advantage of his right to verbatim transcripts nor encumbered his right to a copy of the detailed report of investigation. In her affidavit to the Air Force Court of Criminal Appeals, the IO provided the well-conceived reasons that supported her action, and she stated that she permitted government and defense counsel to present argument on the issue, reviewed the law, and deliberated for two hours before making her decision. The case underscores the very important role that a legal adviser plays in the Article 32 investigation, or, if the Article 32 IO was a judge advocate, the advantages of having an attorney as the investigating officer.

14. *Id.* at 707. The Air Force court issued an order staying the investigation pending the outcome of its resolution of the writ.

15. *MacDonald* was decided in 1970; therefore, it predates the 1984 *MCM*, which first contained the rule on closure of Article 32 investigations. While the new closure rule was based on *MacDonald*, the court did not have occasion to interpret the rule regarding closure until *San Antonio Express-News*.

issue was look at the plain meaning of the rule and drafters' comments. The court reasoned that R.C.M. 405(h)(3) favors open hearings. Even though no cases raised the closure issue since R.C.M. 405 was enacted, the Air Force court also concluded that the "Fatal Vision" rule was probably inconsistent with the 1995 *Manual for Courts-Martial (MCM)* and the CAAF's current view of pretrial procedures in a 1990s military justice system.¹⁷

While the Air Force court was able to discern correctly that R.C.M. 405(h)(3) tipped the scale in favor of open hearings, it was not able to define how a commander or IO should apply the rule to make a closure decision.¹⁸ Rule for Courts-Martial 405(h)(3) leaves the decision to the discretion of the directing commander or IO, but it is unclear on what factors to consider, the appropriate weight to accord to those factors, the evidentiary requirements, the standards of review, and assignment of evidentiary burden.¹⁹ The court declined to look at Supreme Court cases in the area, but held that the IO did not abuse her discretion in closing the hearing.²⁰ The IO's decision was not a reflexive response to the government's request. Because the application of R.C.M. 405(h)(3) was subject to differing interpretation and is a developing area of the law, issuance of mandamus was inappropriate.

Final resolution of the closure issue was complicated by the Army Court of Criminal Appeals decision in *United States v.*

Anderson.²¹ In *Anderson*, the accused was pleaded guilty to attempted larceny, larceny, and forgery.²² During a portion of the accused's providence inquiry and her testimony on sentencing, the military judge closed the proceedings.²³ The accused testified regarding her motivation for committing some of the contested offenses, including the fact that she was the victim of a lesbian rape. According to the accused, the rapist informed the accused that unless she committed larcenies and forgeries, the rapist would reveal information to the public about the incident. Prior to any of the information becoming part of the record, the military judge and counsel discussed the matter in an R.C.M. 802 conference.²⁴ The military judge closed the proceeding to save the accused embarrassment, but failed to provide the specific justification on the record to support closure.²⁵

The military judge's action gave the court occasion to discuss the rules regarding closure of *court-martial proceedings*. Referring to the memorandum opinion of *United States v. Hood*,²⁶ the Army court held that "absent national security or other adequate justification clearly set forth on the record, trials in the United States military justice system are to be open to the public."²⁷ Since an "open trial forum is to ensure that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent,"²⁸ the court applied the "stringent" four-step closure test of *Press Enterprises v. Superior Court of California*.²⁹ The four-step test authorizes closure of criminal trials if: the party seeking closure advances an over-

16. MCM, *supra* note 5, R.C.M. 405(h)(3). The rule provides, with regard to spectators, that "[a]ccess by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." *Id.*

17. *San Antonio Express-News*, 44 M.J. at 710. The Air Force court opined:

In denying Captain MacDonald's petition, the [c]ourt said an Article 32 investigation was not a trial in the Sixth Amendment sense, so there was no requirement that it be public. We believe this dicta may not represent the view of the [CAAF] today, considering the changes to the *MCM* and customary procedures for conducting Article 32 investigations.

Id.

18. *Id.*

19. The court noted that the drafters referred directing commanders and IO's to R.C.M. 806(b), discussion, for a list of factors to consider in a closure decision. *Id.* Rule for Courts-Martial 806 implements the rules regarding public trials. Subsection (b) concerns control of spectators and the circumstances when spectator access to courts-martial may be limited or foreclosed completely to maintain the dignity and decorum of the proceedings. See MCM, *supra* note 5, R.C.M. 806(b). In the discussion, the drafters acknowledge the public's right to, and interest in, a public trial. See *id.* R.C.M. 806(b) discussion. A number of reasons support partial or total closure: prevention of overcrowding or noise might justify limited access; disruptive or distracting appearance or conduct might support exclusion of individuals; a desire to protect witnesses from harm or intimidation justifies exclusion; access may be reduced when there are no other means to relieve inability to testify due to embarrassment; and certain evidentiary hearings might require partial or total closure to prevent panel members from becoming a ware of excluded evidence. *Id.*

20. *San Antonio Express-News*, 44 M.J. at 710. The Air Force court could have gone further and constitutionally analyzed the closure issue as the CAAF did in *ABC, Inc. v. Powell*, 47 M.J. 363 (1997). A constitutional and legislative analysis, in addition to a plain meaning examination, would have provided greater foundation for the decision.

21. 46 M.J. 728 (Army Ct. Crim. App. 1997).

22. The accused was also found guilty of larceny, forgery, and falsely obtaining services. *Id.*

23. *Id.* at 729.

24. Rule for Courts-Martial 802 authorizes the military judge to hold a conference with the parties to consider matters that will promote a fair and expeditious trial. See MCM, *supra* note 5, R.C.M. 802. A military judge can conduct an 802 conference before or during trial. *Id.*

25. *Anderson*, 46 M.J. at 729.

riding interest that is likely to be prejudiced; the closure is narrowly tailored to protect that interest; the court-martial considers reasonable alternatives to closure; and the court-martial makes adequate findings that support closure to aid in review.³⁰

San Antonio Express-News and *Anderson* presented the CAAF with two potentially different views on analyzing a closure issue. *San Antonio Express-News* represented the plain meaning analysis of the MCM provision regarding closure of Article 32 investigations. *Anderson* represented a direct interpretation of R.C.M. 806 and federal and military jurisprudence as it applies to the trial stages of a court-martial. Complicating the matter further, R.C.M. 405(h)(3) referred to R.C.M. 806 for factors to consider in closing the Article 32 investigation. One could argue by analogy that the rules, though applicable to different stages of the military justice process, say the same thing.

Analyzing the cases that support these decisions, the CAAF fashioned a closure rule for Article 32 investigations which retreats entirely from the “*Fatal Vision*” rule. In *ABC, Inc v. Powell*,³¹ Sergeant Major of the Army (SMA) McKinney was charged with four specifications of maltreatment of subordi-

nates, two specifications of assault, and twelve specifications of violations of Article 134 of the Uniform Code of Military Justice (UCMJ).³² The special court-martial convening authority (SPCMCA) directed an Article 32 investigation and ordered the IO “to foreclose access by spectators to all of the proceedings of this investigation in accordance with R.C.M. 405(h)(3).”³³ Sergeant Major McKinney requested reconsideration of the decision.³⁴

In response, the SPCMCA provided four reasons supporting closure,³⁵ but appeared to focus on the need to “protect the alleged victims who would be testifying as witnesses against SMA McKinney, specifically to shield the alleged victims from possible news reports about anticipated attempts to delve into each woman’s sexual history.”³⁶ The CAAF held that a military accused has a qualified right to a public Article 32 investigation.³⁷ In addition, the CAAF held that when the accused is entitled to a public hearing, the public and press have the same right and have standing to complain if access is abridged or denied.³⁸

Similar to the Air Force court’s analysis in *San Antonio Express-News*, the CAAF looked to the plain meaning of

26. No. 9401841 (Army Ct. Crim. App. Feb. 20, 1996), *petition for grant of rev. denied*, 45 M.J. 15 (1996). *Hood* is an interesting case in its own right. The accused was charged with failure to obey a lawful regulation, larceny, wrongful appropriation, and sale of military property arising out of his duties as a squad leader in an ammunition section of his unit’s support platoon. At trial, the accused requested that the court-martial be closed to the public. The military judge closed the court-martial to the public, focusing only on the issue of whether the accused understood and knowingly waived his right to a public trial. The court applied the four-step rule of *Press Enterprises v. Superior Court of California*, 464 U.S. 501 (1984) and found that the military judge had abused his discretion. *Id.* He “acquiesced in the request without offering an explanation for his decision . . . and failed to narrowly tailor the closure or to consider other alternatives.” *Id.*

27. *Anderson*, 46 M.J. at 729. See *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987).

28. *Anderson*, 46 M.J. at 729.

29. 464 U.S. 501 (1984).

30. The application of *Press Enterprises* was not a novel idea. The courts applied the rule to “in-court” proceedings as early as 1977 with the United States Court of Military Appeals decision in *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). See *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987); *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). The 1984 MCM recognized the press’ and the public’s right to a public trial. See MCM, *supra* note 5, R.C.M. 806(a) discussion (providing that “except as otherwise provided in this rule, courts-martial shall be open to the public”). In addition, the discussion to the rule provides that public access “reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process.” *Id.*

31. 47 M.J. 363 (1997). This case is actually two cases that were consolidated for judicial economy.

32. UCMJ art. 134 (West 1995). See *Petition for Extraordinary Relief in the Nature of A Writ of Mandamus*, USCA Doc. No. 97-8024/AR (C.A.A.F. June 19, 1997). The government preferred the charges on 7 May 1997.

33. Memorandum, Commander, Fort Myer Military Community, to COL Robert L. Jarvis, subject: Appointment of Article 32(b) Investigating Officer (undated).

34. Letter from Charles W. Gittins, to Commander, Fort Myer Military Community, subject: Article 32 Investigation (May 13, 1997) [hereinafter Gittins Letter]. Citing *San Antonio Express-News* and, indirectly, the rules regarding the trial stages of a court-martial, the request for reconsideration noted that denial of press and public access to pretrial investigations must be used sparingly. See *id.* Sergeant Major McKinney argued that there was no adequate reason to support closure under applicable case law—there was no national security issue at stake, the alleged victims were not young children who might be harmed by giving testimony at a tender age, and there was no need to protect the alleged victims from embarrassment because their stories were already detailed in the press. *Id.*

35. Letter, Commander, Fort Myer Military Community, to Charles W. Gittins, subject: Article 32 Investigation (May 16, 1997) [hereinafter Commander’s Letter]. Similar to *San Antonio Express-News*, the other reasons for total closure were: to maintain the integrity of the military justice system; to ensure due process to SMA McKinney; and to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the potential pool of panel members.

36. *ABC, Inc.*, 47 M.J. at 364. See also Commander’s Letter, *supra* note 35.

37. *ABC, Inc.*, 47 M.J. at 365.

R.C.M. 405(h)(3) and determined that in ordinary circumstances the rules favor an open investigation.³⁹ Taking the analysis one step further, however, the CAAF indicated that an accused's qualified right to a public Article 32 investigation is as significant as the Sixth Amendment right to a public trial.⁴⁰ This holding is a complete retreat from the *Fatal Vision* rule announced in *MacDonald*.

The standard to apply in deciding whether to close an Article 32 investigation is whether there is a "cause shown that outweighs the value of openness."⁴¹ The CAAF further stated that the determination must be made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim"⁴² Citing *San Antonio Express-News* and *United States v. Hershey*,⁴³ the CAAF determined that closure must "be tailored to achieve the stated purpose and should also be 'reasoned,' not 'reflexive.'"⁴⁴ Finally, only "articulated and compelling" factors justify closure. The court held that the SPCMCA's reasons, although conceived in good faith, did not justify a total or partial closure in *McKinney* because those reasons were unsubstantiated.⁴⁵

A sub-issue of first impression that deserves brief comment from the *McKinney* prosecution⁴⁶ and *San Antonio Express-News* involves the appellate courts' power to review and to grant extraordinary relief from determinations that occur at the

Article 32 stage. In both cases, petitioners/accuseds requested extraordinary relief from the appellate courts to force a commander or an IO to reverse a decision made at the pretrial stage of court-martial. In an attempt to foreclose defense relief, the government's principal argument was that, because the issue concerned a pretrial stage of court-martial, the appellate court lacked authority under the UCMJ to review the matter under the All-Writs Act.⁴⁷

The Air Force court's leap in *San Antonio Express-News* toward extending its supervisory authority to include Article 32 investigations is logical and artful. The court began with the conclusion that the Court of Military Appeals liberally defined the limits of the All-Writs Act to include matters that may *potentially* reach the appellate court.⁴⁸ Two major premises support the holding. First, an Article 32 investigation is an integral part of a court-martial; a general court-martial cannot occur unless an Article 32 is conducted or the accused waives that proceeding.⁴⁹ Second, an Article 32 investigation is a judicial proceeding, and the IO is a quasi-judicial officer. The Air Force court brought the syllogism to its logical end: an issue involving a judicial proceeding that is an integral part of the court-martial may potentially reach an appellate court, which has the responsibility for supervising "each tier of the military justice process to ensure that justice is done."⁵⁰

38. *Id.*

39. *Id.* at 365. The CAAF quoted the language of the rule, but also emphasized that the discussion of the rule provides that "[o]rdinarily the proceedings of a pretrial investigation should be open to spectators." *Id.*, quoting MCM, *supra* note 5, R.C.M. 405(h)(3) discussion.

40. *ABC, Inc.*, 47 M.J. at 365 (citing *Press Enter. v. Superior Court of California*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982); *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980)). The military case that implemented these rules for the formal stages of courts-martial is *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). See *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); *MacDonald v. Hodson*, 42 C.M.R. 184 (C.M.A. 1970); *United States v. Brown*, 22 C.M.R. 41 (C.M.A. 1956).

41. *ABC, Inc.*, 47 M.J. at 365.

42. *Id.*

43. 20 M.J. 433 (C.M.A. 1985).

44. *ABC, Inc.*, 47 M.J. at 365.

45. *Id.*

46. As will be discussed, the Army Court of Criminal Appeals entertained a court-martial personnel issue in *McKinney*. That case is discussed in another section of this article. See *McKinney v. Jarvis*, 46 M.J. 870 (1997).

47. 28 U.S.C.A. § 1651 (West 1997).

48. See *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Regarding the supervisory authority of the Courts of Military Review, the Court of Military Appeals stated:

An appellate tribunal of that sort . . . has judicial authority over the actions of trial judges in cases that may *potentially* reach the appellate court Without stopping to define the limits of such independent proceedings, we have no doubt that, as the highest tribunal in each service, a Court of Military Review can confine an inferior court [within its system] to a lawful exercise of its prescribed jurisdiction.

Id. at 220 (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)).

49. See UCMJ art. 32(a) (West 1995).

The Article 32 closure cases present many lessons for practitioners. First, while not specifically making the Article 32 investigation a trial proceeding under the Sixth Amendment, the CAAF did reason by analogy that an accused has a qualified right to a public Article 32 investigation similar to the right to a public trial. Trial and defense counsel who seek to close the proceedings must have clearly articulated, well-founded, and empirical reasons for doing so. The CAAF will review Article 32 closures under a constitutional-based analysis with the view that the right to an open investigation is akin to the public trial rights under the Sixth Amendment.⁵¹ Because R.C.M. 405(h)(3) and R.C.M. 806 appear to tip the scale in favor of an open hearing, any closure must be specifically tailored to protect an interest that outweighs the value of an open hearing. Partial closure should always be the first option to protect an interest that outweighs openness.

Second, the CAAF implicitly reminded practitioners of the importance of the Article 32 advisor to the IO. *San Antonio Express-News* appears to be the picture-perfect case to illustrate the value of the advisor to an Article 32 investigation. When confronted with the closure issue, the IO heard arguments, reviewed the law, and deliberated for two hours before ruling.⁵² She then announced the specific basis of her ruling and told both counsel and the accused that closure would not abridge the accused's right to a verbatim transcript investigation, or result in a gag rule.⁵³ The judicious manner in which the IO handled this complicated turn of events communicates that a savvy Article 32 advisor knew what to do and how to do it and understood that the issue would receive appellate review. An Article 32 advisor who counsels based on the "long view" of the case will ensure that a hearing is completed to accomplish the statutory and jurisprudential ends contemplated by Article 32 and R.C.M. 405.

Anderson, while an important link in the modern development and culmination of the closure issue in *McKinney*, is pivotal for military judges. In *Anderson*, the military judge closed the proceedings upon the request of the accused. The public's right of access to courts-martial was relegated to a position of secondary importance. The military judge, however, failed to include a justification or explanation for closure on the record. Military judges have a difficult mission in a closure situation: they must balance the accused's waiver of the R.C.M. 405(h)(3) and 806 rights to a public hearing and trial against the public's First Amendment right to open proceedings and the government's reasons supporting closure. An accused's request to limit dissemination of embarrassing sexually-related information might sway a military judge toward closure. The trick for military judges is not to forget that the competing interest must always be weighed. As the Army court cautioned in *Anderson*, military judges should not be "lulled into error by parties who join in a closure request."⁵⁴

SOMETHING NEW

Pleas and Pretrial Agreements: A Continuing Analysis and Constriction of a New Rule

No rules at the CAAF have received greater attention over the last two years than those regarding terms that practitioners can propose, negotiate, accept, and approve as part of a pretrial agreement. The court addressed the lawfulness of pretrial agreement terms in the 1995 case of *United States v. Weasler*.⁵⁵ For the first time in the CAAF's forty-seven-year history, it held that an accused could lawfully waive an unlawful command influence issue in a pretrial agreement. The only conditions imposed on this waiver provision were that the defense initiate the term and that it only concern accusatory stage⁵⁶ unlawful command influence.

Perhaps the most important part of *Weasler* was the CAAF's promise, in response to Judge Sullivan's and the late Judge Wiss' concurrences, to conduct special review of all future

50. *San Antonio Express-News v. Morrow*, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996).

51. The primary reason why the CAAF invalidated the closure in *McKinney* was because, although the justifications were well-stated, they were lacking in foundation. There was no evidence to support the conclusion that the witnesses would be embarrassed after testifying, because their stories had already been detailed in the press. See Gittins Letter, *supra* note 34. The civilian defense counsel's letter requesting reconsideration is particularly revealing on this point. In addition, the most impressive part of the *McKinney* opinion is the CAAF's review of cases in which civilian sister courts, both state and federal, delineate those situations where a trial or a pretrial proceeding should be closed. Practitioners involved in any closure situation would do well to review this part of the *McKinney* case to get a clear picture of the reasons that might justify partial or total closure.

52. *San Antonio Express-News*, 44 M.J. at 707.

53. *Id.* at 708.

54. *United States v. Anderson*, 46 M.J. 728, 732 (Army Ct. Crim. App. 1997) (quoting *United States v. Hood*, No. 9401841 (Army Ct. Crim. App. Feb. 20, 1996)).

55. 43 M.J. 15 (1995). See Major Gregory B. Coe, *supra* note 3; Major John I. Winn, *Recent Developments in Military Pretrial and Trial Procedure*, ARMY LAW., Mar. 1996, at 40; Major Ralph H. Kohlmann, *Saving the Best Laid Plans: Rules of the Road for Dealing with Uncharged Misconduct Revealed During Providence Inquiries*, ARMY LAW., Aug. 1996, at 3 n.70.

56. The accusatory stage is before referral of charges to a court-martial. An improper action during this stage can be withdrawn and properly reinitiated. The adjudication stage is after referral, and correction of an error at this stage is almost impossible without reversing the findings or granting sentence relief.

cases that involve pretrial agreement terms based on unlawful command influence.⁵⁷ Since *Weasler*, neither the intermediate service courts nor the CAAF have had the opportunity to review a case involving an unlawful command influence term in a pretrial agreement. The emphasis for post-*Weasler* cases has been directed toward informing practitioners to view *Weasler* with a modest eye—that is, terms in a pretrial agreement must not violate R.C.M. 705 and public policy.⁵⁸ In 1997, the courts had the opportunity to apply *Weasler* in an unlawful command influence context and further define the limits of bargainable terms.

Social Misfits, Unlawful Command Influence, and Pretrial Agreements: United States v. Bartley

In *United States v. Bartley*,⁵⁹ the accused entered guilty pleas to absence without leave, wrongful use of cocaine and marijuana, and wrongful appropriation of an automobile.⁶⁰ Though he had a pretrial agreement, the accused subsequently alleged that there was a sub rosa agreement to waive an unlawful command influence issue concerning the convening authority's negative predisposition and inelastic attitude toward drug offenses and offenders.

Prior to the accused's case, a poster around the command detailed certain "myths" about drug use and its impact on the mission.⁶¹ The substantive basis of the accused's request for relief was that his defense counsel, based on a sub rosa agreement with the government, failed to make the unlawful command influence motion regarding the poster.⁶² The defense counsel intentionally failed to raise the issue, probably because he believed it was not "winnable"⁶³ and he could get more mileage out of the unlawful command influence during negotiations with the government. Neither the government nor the defense reduced any potential agreements regarding the issue to writing. Indeed, the convening authority and staff judge advocate disavowed any knowledge of the agreement, and the "staffer" followed suit.⁶⁴

The Air Force Court of Criminal Appeals held that the poster did not constitute unlawful command influence, and that it simply raised some issues regarding drug use and its potential impact on military operations without suggesting a punishment.⁶⁵ The convening authority and staff judge advocate were unaware of the unlawful command influence issue, and the pretrial agreement neither referenced nor required a specific waiver of the unlawful command influence issue to obtain a sentence limitation.⁶⁶ On these bases, the Air Force court

57. See *Weasler*, 43 M.J. at 19. The CAAF stated that "[it] will be ever vigilant to ensure that unlawful command influence does not play a part in our military justice system." *Id.*

58. An unfortunate by-product of *Weasler* is the idea that R.C.M. 705 now permits the government and the defense to negotiate, to agree to, and to approve any and all terms imaginable (as long as the accused understands his rights, the defense proposes the term, and special attention is paid to unlawful command influence situations). This is not what the CAAF intended in *Weasler*.

59. 47 M.J. 182 (1997). This article will discuss the unlawful command influence issues raised with regard to their impact on pretrial agreements only.

60. The accused was sentenced to a bad-conduct discharge, confinement and partial forfeitures for 12 months, and reduction to the lowest enlisted grade. The pretrial agreement did not affect the convening authority's action. It provided that confinement in excess of 36 months would be disapproved. *Id.* at 183.

61. *Id.* at 184, 186. The poster, entitled "Who's Kidding Whom?," listed the myths of drug use and explained why people who subscribe to those myths do not understand why they are incompatible with Air Force concepts of discipline and justice. The CAAF noted three of those myths: "Off-Duty Activities Should Not Affect EPR [Enlisted Performance Report] Evaluations"; "Drug Abusers Still Can Be Considered Well Above Average Military Members"; and "Drug Abusers Can Be Trustworthy, Dependable Airmen." *Id.* The poster was displayed, among other places, in the waiting room of the convening authority's office and the SJA's office.

62. The information regarding the motion is confusing at best. The affidavits created at the request of the Air Force Court of Criminal Appeals when the case was in the first stage of the appellate process indicated that the individual defense counsel (IDC) had already drafted a motion based on unlawful command influence. According to this affidavit, the IDC decided not to proceed with the motion because the convening authority who authored the poster "ceased" to be the general court-martial convening authority (GCMCA). *The court does note that the same convening authority continued in command.* What is clear from this affidavit is that the IDC and the area defense counsel (who represented accused at the Article 32 investigation) discussed the unlawful command influence motion with an individual responsible for staffing military actions to the GCMCA. An interesting fact in the case, which tips the scale toward concluding that at least the defense discussed the issue with the civilian "staffer," is that the defense had drafted a written motion to raise the issue at court-martial. *See id.* at 185.

63. *Id.*

64. The staffer, a civilian attorney, indicated that he had a responsibility to process pretrial agreements. He stated that he processed the pretrial agreement in this case consistent with prior practice. However, the staffer specifically denied that he discussed unlawful command influence with any member of the defense team. *Id.* at 185.

65. *Id.* The court cited language that indicated that the poster actually suggested rehabilitative alternatives to remedy drug abuse in the Air Force, although it pointed out that the military does not provide a "perpetual rehabilitation service for social misfits." *Id.* The court noted that the poster indicated that the Air Force "should try to return to duty members who show real promise for further service," but it also indicated that the Air Force does not have the resources to "restore every member." *Id.*

66. *Id.* at 185-86.

affirmed the accused's conviction and validated the pretrial agreement.

True to its promise in *Weasler*, the CAAF took another view and reached a different result. Highlighting that it "has been diligent in guarding against unlawful command influence,"⁶⁷ the CAAF focused its decision on how the prohibition against sub rosa agreements affect unlawful command influence issues. Rule for Courts-Martial 705(d)(2) implements the prohibition.⁶⁸ The CAAF, however, was particularly interested in giving practitioners and intermediate appellate courts a lesson on why courts must ensure that pretrial agreements involving unlawful command influence are always consistent with the UCMJ and case law.

Citing *United States v. Jones*,⁶⁹ *United States v. Green*,⁷⁰ and *United States v. King*,⁷¹ the CAAF stressed the constitutional and statutory significance of pretrial agreements that reflect the accused's voluntary and knowing acceptance of terms.⁷² The court said that the pretrial agreements in *Weasler* and, the most recent case to directly interpret its meaning, *United States v. Rivera*⁷³ were in writing and discussed during the providence inquiry.

The CAAF required reversal in *Bartley* for two reasons. First, there was no indication from filed documents that the accused was aware of the specific reason that the defense counsel waived the motion.⁷⁴ Second, and more important, even if the accused was aware of the issue, the matter was never raised at the trial.⁷⁵ The *court-martial* did not have a fair opportunity to determine whether the unlawful command influence issue

illegally forced the accused to plead guilty. This is an extremely important point for practitioners and the intermediate appellate courts.

When the accused raises a "lack of understanding" or a sub rosa agreement argument regarding unlawful command influence and pretrial agreements, the CAAF would rather be careful than "deductive." While the Air Force court determined that the poster was neutral⁷⁶ regarding the proper disposition of military drug offender cases, the CAAF reasoned that, neutral or not, the poster "negate[d] many defense arguments in favor of rehabilitating drug users like the appellant."⁷⁷ While the Air Force court determined that the defense counsel's failure to mention unlawful command influence at any stage of the court-martial was a key issue,⁷⁸ the CAAF focused on the appellate courts' inability to review the matter for lack of a complete record.⁷⁹

The CAAF's opinion was unanimous and appropriately focused on the narrow issue of unlawful command influence in the context of pretrial agreements. *Bartley* might be the case that assuages those with apocalyptically negative interpretations of *Weasler's* capacity to produce "blackmail type options" and encourage rather than decrease incidences of unlawful command influence.⁸⁰

Drugs, More Drugs, and Restitution: Weasler Odds and Ends

67. *Id.* at 186.

68. See MCM, *supra* note 5, R.C.M. 705(d)(2).

69. 23 M.J. 305 (C.M.A. 1987).

70. 1 M.J. 453 (C.M.A. 1976).

71. 3 M.J. 458 (C.M.A. 1977).

72. See *Bartley*, 47 M.J. at 186. See also *King*, 3 M.J. at 458; MCM, *supra* note 5, R.C.M. 910(f)(4).

73. 46 M.J. 52 (1997).

74. *Bartley*, 47 M.J. at 186.

75. *Id.* *Weasler* teaches that, with regard to pretrial agreements, accusatory stage unlawful command influence is waivable if specifically included in the pretrial agreement. Unlawful command influence, as a general matter, is never waived. The fact that the accused pleaded guilty, therefore, did not waive the unlawful command influence issue.

76. *Id.* at 186. The Air Force Court of Criminal Appeals determined that the poster was, as a general matter, neutral on how the Air Force and the military ought to deal with drug abusers.

77. *Id.*

78. *Id.* It is easy to overlook the CAAF's language regarding the impact of *Weasler* on the court-martial stages of *Bartley*. The CAAF was not about to criticize counsel for failing to raise the issue based on *Weasler* because, at the time of the case, *Weasler* had not been issued. What the court did say, however, was that counsel should have placed the issue on the record, considering the prior case law on unlawful command influence and the MCM provisions dealing with that issue. *Id.* See *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987); *United States v. King*, 3 M.J. 458 (C.M.A. 1977); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976).

79. *Bartley*, 47 M.J. at 187.

The “odds and ends” cases involving the contours of *Weasler* and R.C.M. 705(c)(2) continue to present the courts with novel issues. The trends continue from the last two years. First, as in previous years, the courts are carefully reviewing the terms of pretrial agreements to ensure compliance with case law and regulation. Second, the courts are focusing on waiver as a primary means to deny the accused appellate relief. Third, continuing a trend from 1995, the court will not permit an accused to claim the benefit of a pretrial agreement term and then to obtain relief based upon an argument that the term is inconsistent with the spirit and intent of R.C.M. 705(c)(2).⁸¹

In *United States v. Rivera*,⁸² the CAAF reviewed a pretrial agreement that contained a defense proposed term that required the accused to “waive all pretrial motions” and “to testify at any trial related to [his] case without a grant of immunity.”⁸³ The benefit of the bargain for the accused, who was charged with multiple drug offenses, was a very favorable fourteen-month limitation on potential confinement. Rivera “beat the deal” and received only twelve months confinement.

Dissatisfied with the outcome of his court-martial, Rivera questioned the terms of his agreement, arguing that they were void as against public policy and Air Force regulation.⁸⁴ Further, the accused argued that the convening authority was required to issue him a grant of immunity so that he could comply with the “testify” provision in the pretrial agreement without the threat of further prosecution. The Air Force Court of Criminal Appeals rejected the accused’s public policy, regulatory, and immunity arguments. Nothing in the pretrial agreement indicated that there were viable motions that could be

made.⁸⁵ Moreover, the court held that the language of R.C.M. 705(c)(2)(B) did not require a convening authority to issue a grant of immunity to an accused in support of an agreement to “testify without a grant of immunity.”⁸⁶

The CAAF opinion in *Rivera* is illuminating because it draws strength from the recent trend to look first at how the Supreme Court and federal circuits analyze and dispose of similar issues. Additionally, the opinion is indicative of a continuing trend in the area of pretrial agreements to make relief contingent upon the absence of waiver.⁸⁷

The CAAF reviewed the recent changes to R.C.M. 705(c) and concluded that R.C.M. 705(d)(1), which now permits either the defense or the government the right to propose terms to a pretrial agreement, was the culmination of a plethora of changes that liberalized pretrial agreement practice.⁸⁸ The CAAF then recognized the impact of Article 36,⁸⁹ which mandates that the President, when it is practicable, implement procedures to make the practice of criminal law in courts-martial identical with that of the United States district courts.⁹⁰

The court then relied on a 1995 Supreme Court case, *United States v. Mezzanato*,⁹¹ to quash the issue raised by divergent interpretations regarding the negative effect of *Weasler* on the military justice system.⁹² In *Mezzanato*, the government obtained the accused’s consent, as a precondition to pretrial negotiations, to use the accused’s statements during those negotiations to impeach contradictory statements made at trial.⁹³ The most important part of *Mezzanato* is the Supreme Court’s language regarding the effect of such a practice on the federal

80. See *United States v. Weasler*, 43 M.J. 15 (1995) (Sullivan, J., concurring). Concurring in the result, Judge Sullivan wrote that the case would produce “blackmail-type” options for those who might engage in unlawful command influence in courts-martial. *Id.* at 21. The late Judge Wiss wrote, “I believe that this Court will witness the day when it regrets the message that this majority opinion sends to commanders.” *Id.* at 22.

81. See MCM, *supra* note 5, R.C.M. 705(c)(2) (providing a nonexclusive list of bargainable terms for pretrial agreements). Practitioners should also consider the limitations of R.C.M. 705(c)(1), which provide the general categories of terms that cannot be subjected to bargaining. See, e.g., *United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995) (holding invalid a pretrial agreement which increased the quantum portion by one year if the accused raised a claim of de facto immunity).

82. 46 M.J. 52 (1997). Practitioners should also review the opinion of the Air Force Court of Criminal Appeals, which appears to examine more closely the practical considerations in processing and reviewing pretrial agreements prior to approval and during court-martial. See *United States v. Rivera*, 44 M.J. 527 (A.F. Ct. Crim. App. 1996).

83. *Rivera*, 46 M.J. at 53.

84. For a more complete review of the Air Force court’s opinion, see Coe, *supra* note 3.

85. The court was careful to tell practitioners that the term might invalidate the agreement under a different set of facts. If the record indicated that there was a viable motion, the court might have ordered a post-trial hearing. *Rivera*, 44 M.J. at 530.

86. *Id.* at 529.

87. While the post-*Weasler* courts are willing to let the accused deal for terms which were previously questionable or inconsistent with R.C.M. 705 as a matter of public policy, the courts will not readily allow the accused to argue that, even though he benefited from the pretrial agreement, a term of the agreement violates public policy. One of the tools that the courts have employed to foreclose arguments of this kind is waiver. If it appears that the accused in engaging in sophistry—that is, if the argument is primarily based on public policy and the accused’s actions appear to indicate acceptance of the potential detriment to the military justice system—he should not have standing to claim relief based on a wrong committed against the military justice system.

88. See *Rivera*, 46 M.J. at 53.

89. *Id.*

system of justice. The Court concluded, and the CAAF referenced, that waiver of some rights is expressly and implicitly prohibited because they are “so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discredit[ing] the federal courts.”⁹⁴ The CAAF alluded to this language in *Weasler*, but signaled its significance by citing to it again in *Rivera*.

Indicative of post-*Weasler* cases, the CAAF completed an exacting review of the case to ensure that the accused was not deprived of any rights.⁹⁵ The CAAF affirmed, holding that the “waiver of all pretrial motions” was too broad and might result in waiver of a viable motion under other circumstances.⁹⁶ *Rivera*, however, failed to identify, and the record did not indicate, any viable motions.⁹⁷ In addition, the CAAF denied relief based on a potential deprivation of the right to make evidentiary motions, especially since the record indicated the absence of such motions and the accused waived these potential motions by failing to raise them at trial.⁹⁸

Finally, the court disposed of the “testify without a grant of immunity” issue. The accused argued that both he and the military justice system were harmed by a term which required him to testify in cases related to his own without the protection of immunity. Such a term could subject the accused to prosecution if interpreted to require testimony about drug transactions that indirectly related to his providence inquiry. In addition, the accused argued that the term was a novelty. Rule for Courts-Martial 705(c)(2)(B) authorizes parties to negotiate terms which require an accused to testify in other cases, but it does not address the situation where an accused testifies with the benefit of a grant of immunity.⁹⁹

The CAAF acknowledged the novelty of the accused’s argument, stating that the drafters intended to leave this “gap” in the legal relationship between R.C.M. 705 and R.C.M. 704.¹⁰⁰ The basis for the “gap” is the policy in the military justice system to control the issuance of grants of immunity. Any court-martial convening authority can enter into a pretrial agreement on behalf of the government, but only a general court-martial convening authority can issue a grant of immunity.¹⁰¹ As an analyt-

90. See UCMJ art. 36(a) (West 1995). Article 36(a) provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id.

91. 513 U.S. 196 (1995).

92. *Rivera*, 46 M.J. at 54.

93. See *Mezzanato*, 513 U.S. at 198. See also FED R. EVID. 410(4) (providing that an accused’s statements made to a prosecuting attorney during pretrial negotiations are excludable at trial). Military Rule of Evidence 410 almost mirrors the civilian federal rule. See MCM, *supra* note 5, MIL. R. EVID. 410.

94. *Rivera*, 46 M.J. at 54 (citing *Mezzanato*, 513 U.S. 196). It is important to note, however, that other language in *Mezzanato* is more sweeping. The Supreme Court commented that even “the most basic rights of criminal defendants . . . are subject to waiver . . . [and this might include] many of the most fundamental protections afforded by the Constitution.” *Mezzanato*, 513 U.S. at 201. See *Ricketts v. Adamson*, 483 U.S. 1, 19 (1987).

95. A particularly exacting analysis is required because the implicit issue that the accused raises in most of the post-*Weasler* cases is a deprivation of fundamental fairness in the pretrial agreement negotiation, approval, and implementing processes.

96. *Rivera*, 46 M.J. at 54.

97. *Id.*

98. *Id.*

99. See MCM, *supra* note 5, R.C.M. 705(c)(2)(B) (providing that “[a] promise to testify as a witness in the trial of another person” is a permissible term in a pretrial agreement). The discussion to this provision directs practitioners to look at R.C.M. 704, which provides the rules regarding testimonial immunity. See *id.* R.C.M. 704(c) (providing that only a GCMCA may grant immunity).

100. *Rivera*, 46 M.J. at 54. The CAAF stated:

Neither the rules nor the drafters’ analysis expressly address the question of whether the convening authority and an accused can enter into a pretrial agreement, such as the one in this case, which could have the possible effect of not only depriving the accused of the benefit of his bargain if he does not testify, but also forcing him to further incriminate himself and subjecting him to prosecution for wrongful failure to testify.

Id.

101. See MCM, *supra* note 5, R.C.M. 704(c).

ical matter, the reason for the “gap” is clear. *Rivera* presents the result of the gap—an accused who must testify in future trials based on an expansive pretrial agreement term that might subject that accused to further prosecution based on the testimony. The result of the gap may not have been within the full contemplation of the drafters.

There are times when even the most artful arguments do not prevail. Such was the case in *Rivera*. The CAAF denied relief and also declined the opportunity to directly confront the “theoretical issues in this case.”¹⁰² The CAAF reasoned that it did not have to resolve the theoretical issues based on ripeness since the government had not yet called upon *Rivera* to testify.¹⁰³ Thus, there was no encumbrance on his Fifth Amendment right against self-incrimination. Second, under *Mezzanato*, the CAAF viewed the term as very favorable to the accused, especially considering that the record indicated an absence of overreaching.¹⁰⁴ The accused was able to “maximize what he ha[d] to sell” because he was “permitted to offer what the prosecutor [was] most interested in buying.”¹⁰⁵ Consequently, *Rivera*’s intent, demonstrated by entry of the plea, statements made during the providence inquiry, and failure to raise the issue at trial, constituted a knowing, intelligent, and voluntary *waiver* of the issue.

Rivera has clear lessons for practitioners. First, pretrial agreement terms must be carefully reviewed. Second, the CAAF reminded counsel about waiver—when it looks like the accused is getting the benefit of the bargain, and the questioned term might involve foregoing a fundamental right, no relief will be available if the accused proposed the term and then subsequently pleads without objection. In other words, the accused should not rely on the idea that public policy arguments will be available to support relief at the appellate stage. The time for the defense to assist the accused is confined to the pretrial, trial, and post-trial stages of the military justice process.¹⁰⁶

The CAAF’s failure to address fully the relationship between R.C.M. 705 and R.C.M. 704 is disappointing.¹⁰⁷ Rather than simply focusing on waiver, the CAAF could have determined the validity of the term and then applied a harmless error analysis.¹⁰⁸ This would have, at least, answered or clarified the relationship for practitioners. Fortunately, there is one case, albeit unpublished, that illustrates how a “testify without immunity” term should be interpreted. In addition, two other cases are instructive for counsel in the area of bargainable terms.¹⁰⁹

More Drugs: United States v. Proffitt

102. *Rivera*, 46 M.J. at 54.

103. *Id.*

104. The CAAF also used language from *Mezzanato* that indicates where the CAAF will draw the fine line of demarcation between what is permissible and what is prohibited. The CAAF adopted the following language from *Mezzanato*:

The mere potential for abuse of prosecutorial bargaining is an insufficient basis for foreclosing negotiation altogether . . . Instead, the appropriate response to respondent’s predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion. We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive [the evidentiary objection to incriminating statements] is valid and enforceable.

Id. The CAAF’s subscription to this concept is particularly prophetic considering *Bartley*, where the CAAF unanimously returned the case for further action to obtain information concerning whether the accused was aware of and knowingly waived an unlawful command influence issue to obtain a pretrial agreement. *See generally* *United States v. Bartley*, 47 M.J. 182 (1997).

105. *Rivera*, 46 M.J. at 54.

106. In my opinion, *Weasler* was the CAAF’s first step in stating that there was no longer a need for heightened paternalism in the review of pretrial agreement terms. *Rivera* adds one other piece to the pie—the onus is on counsel, in these non-paternalistic times, to be even more vigilant, both in proposing maverick terms that may assist the accused-client and in making sure that the accused is aware that his waivers will stand for all time because it will be rare that the government, even inadvertently, will engage in overreaching.

107. The disappointment is purely from a practitioner’s point of view. Trial and defense counsel, military justice managers, and military judges like to have clear-cut answers, if possible, when they are preparing for courts-martial.

108. In fact, Judge Sullivan, in a very short concurrence, writes that the immunity term was unlawful, but he also indicates his agreement that the legal error was harmless. *Rivera*, 46 M.J. at 55 (Sullivan, J., concurring).

109. The cases discussed in this article adequately illustrate the *Weasler-Rivera* trend and the general effect of pretrial agreements. There are two other cases that are not addressed here that practitioners should review. *See* *United States v. Smith*, 46 M.J. 263 (1997) (holding that a pretrial agreement term could not be interpreted to grant a SPCMCA the right to process a vacation action to completion without GCMCA action in a case where the sentence included a bad-conduct discharge); *United States v. Acevedo*, 46 M.J. 830 (C.G. Ct. Crim. App. 1997) (holding that a pretrial agreement that provided for suspension of a dishonorable discharge could not be read to preclude approval of an adjudged unsuspended bad conduct discharge). *See also* *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997) (holding that a sentence cap in a court-martial pretrial agreement is not a grant of clemency or a true plea bargain identical to civilian practice and has no bearing on a convening authority’s disposition of a clemency request).

In *United States v. Profitt*,¹¹⁰ the Air Force Court of Criminal Appeals was again asked to review a pretrial agreement that apparently contained novel terms. Consistent with his pretrial agreement, the accused entered guilty pleas to making a false official statement and use and distribution of LSD.¹¹¹ On appeal, the accused argued that three terms in his pretrial agreement violated public policy. The court considered whether a term that required the accused not to request convening authority funding for more than three witnesses violated public policy. The court reasoned that this term was another way of waiving the right to obtain personal appearance of witnesses at sentencing proceedings under R.C.M. 705(c)(2)(E).¹¹²

The accused also challenged the requirement that he not raise any “waiverable” pretrial motions. The Air Force court acknowledged that the term was confusing, but indicated that the military judge discussed the matter in “great detail at trial,” the parties agreed that the term did not require the waiver of any constitutional motions, and the record was “devoid” of any viable pretrial motions.¹¹³

Most importantly, the Air Force court reviewed the appropriateness of a term that required the accused to “testify without immunity against any other military member.”¹¹⁴ The accused presented the same arguments as the accused in *Rivera*, namely, that the requirement to provide truthful testimony included those cases that might have nothing to do with the accused’s case. What is interesting to note in this case, however, is that the court clearly indicated that the government proposed the

term. This might have led to a different result, but the court also indicated that there was no coercion or force in securing the accused’s acceptance of the term.¹¹⁵

The court told practitioners that the best way to understand a “testify without immunity” term is to apply a “common sense” analysis.¹¹⁶ The court said that such an analysis “dictates that the convening authority was requiring appellant to testify in future trials related to the drug offenses in which he was involved.”¹¹⁷ Like the CAAF in *Rivera*, the Air Force court stated that the adverse impact of the term on appellant was speculative, because the accused had not yet been called to testify. The court, however, provided practitioners with an answer to the question of the relationship of R.C.M. 705 and R.C.M. 704.¹¹⁸

In another significant case involving wrongful use of drugs, the Navy-Marine Corps Court of Criminal Appeals reviewed the appropriateness of terms for pretrial agreement practice. In *United States v. Davis*,¹¹⁹ the accused was charged with unauthorized absence, wrongful possession of drug paraphernalia, wrongful use of marijuana and cocaine, and making and uttering bad checks.¹²⁰ The accused’s pretrial agreement required, inter alia, that he enter into a confessional stipulation and present no witnesses or other evidence on the merits.¹²¹ The accused was not required to enter a guilty plea.

At trial, the military judge examined the accused about his confessional stipulation, which admitted every element of the

110. No. ACM 32316, 1997 WL 165434 (A.F. Ct. Crim. App. Apr. 4, 1997), *petition for grant of rev. filed*, 47 M.J. 69 (1997).

111. The accused was sentenced to 30 months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority granted clemency by reducing the confinement from 30 to 20 months. *Id.* at 1.

112. *Id.* at 2. Rule for Courts-Martial 705(c)(2)(E) provides that “[s]ubject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional condition: A promise to waive . . . the opportunity to obtain personal appearance of witnesses at sentencing proceedings.” MCM, *supra* note 5, R.C.M. 705(c)(2)(E).

113. *Profitt*, 1997 WL 165434, at 3. One of the goals of a pretrial agreement is to make a trial a little easier to process. Including a term that requires an accused not to raise any “waiverable” motions creates a greater possibility for appellate litigation and potential reversal of a case. In this case, expedience probably required that the parties negotiate and then specifically list the motions that the accused intended to waive. This may cause more time in negotiation and processing, but it will yield greater benefits in the future.

114. *Id.* at 2.

115. As is important with any term, it is incumbent on the military judge to obtain the accused’s understanding and consent to inclusion of the term in the pretrial agreement.

116. *Profitt*, 1997 WL 165434, at 2.

117. *Id.*

118. *See id.* *See also* MCM, *supra* note 5, R.C.M. 704, 705. The court indicates that the relationship is one of form and substance. The drafters intended that immunity be controlled. To that end, the MCM provides that only a GCMCA may grant immunity. Pretrial agreement practice recognizes this; however, pretrial agreement practice is based on the accused trading something to get a benefit. An agreement to testify in another trial recognizes that such an agreement is confined to those matters revealed during the stages of the accused’s own court-martial. It makes sense, then, that to require any more from an accused necessitates going to the GCMCA and getting a grant of immunity. Still, a term that commingles immunity and testimony in a pretrial agreement raises structural and constitutional issues. Practitioners, particularly trial counsel, should be mindful of this and avoid the issue altogether or specifically explain the meaning of the term in the pretrial agreement.

119. 46 M.J. 551 (N.M. Ct. Crim. App. 1997).

120. *Id.* at 552.

offenses, but there was no providence inquiry because the accused pleaded not guilty to the offenses. During the trial, the defense counsel did not make an opening statement on findings and presented no motions or evidence on the merits. During sentencing, the defense presented “persuasive evidence and testimony, and then argued vigorously, in an effort to limit his punishment.”¹²²

The issue in this case of first impression was whether a pretrial agreement which does not require a guilty plea is appropriate under R.C.M. 705 and public policy. The Navy-Marine Corps court held that the pretrial agreement was “not inconsistent” with due process.¹²³ Reviewing cases which prohibit practices that tend to reduce the providence inquiry to an “empty ritual,”¹²⁴ the court held that the pretrial agreement was valid based on the military judge’s ingenuity in questioning the accused. Instead of permitting the accused to oxymoronically plead not guilty to all charges consistent with the pretrial agreement, the military judge conducted a *protracted* and *intensive* inquiry under *United States v. Bertelson*.¹²⁵ The military judge informed the accused of the elements of the offense, asked whether he understood those elements, and also went over the entire pretrial agreement with accused and counsel.¹²⁶

But the court did not terminate the analysis there. Noting that the military judge’s experience and caution saved the day for the government, the court interpreted the actions of counsel as an intentional plan to avoid the providence inquiry. The providence inquiry is an integral part of the guilty plea,¹²⁷ and practices which attempt to avoid it are improper.¹²⁸

What, then, should trial and defense counsel do in a case where the accused decides that a pretrial agreement is appropriate but that a guilty plea is impossible? The Navy-Marine Corps court did not foreclose completely the option of doing exactly what was done in *Davis*. Counsel, however, must ensure that the accused understands that his actions may result in waiver of fundamental rights. The court, showing its disapproval of such an option, stated: “In zealously representing the competing interests of their clients, practitioners should follow . . . well-established procedures.”¹²⁹ The well-established procedure is that an accused, pursuant to a pretrial agreement, pleads guilty to at least some charges in exchange for convening authority action. The most correct avenue of approach, therefore, is to secure a favorable agreement that permits the accused to enter at least mixed pleas.¹³⁰

Equally important, what should a military judge do in a case involving a novel pretrial agreement? *Davis* reminds military judges that “caution and questioning” is the rule. It never hurts to conduct an overly careful inquiry in such a situation. Additionally, while the most important information to place on the record is the accused’s responses to key questions, military judges should also obtain counsel’s understanding and assurances about the pretrial agreement. Counsel’s understanding of terms is an important component of pretrial agreement terms analysis.¹³¹

More Drugs: Entrepreneurs and Restitution

121. *Id.* at 554. The accused must have been a superb Marine. The approved pretrial agreement also required the accused to proceed in a military judge alone forum and to complete in-patient drug rehabilitation “at the earliest practicable time.” *Id.* In return, the convening authority promised to suspend all confinement in excess of twelve months. The military judge sentenced the accused to one year confinement, total forfeitures, reduction to the grade of E-1, and a bad-conduct discharge. The pretrial agreement had no effect on the sentence. Nevertheless, it is an extremely favorable agreement considering the offenses. *Id.*

122. *Id.* at 554.

123. *Id.*

124. *See* *United States v. Allen*, 25 C.M.R. 8 (C.M.A. 1957) (holding that a pretrial agreement should not transform the trial into an “empty ritual”). *See also* *United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975) (holding that pretrial agreements should concern themselves with bargaining only on the charges and the sentence); *United States v. Cantu*, 30 M.J. 1088 (N.M.C.M.R. 1989) (holding that practices that involve “a not guilty plea in name only” are questionable).

125. 3 M.J. 314 (C.M.A. 1977) (holding that a confessional stipulation is admissible only after the military judge conducts questioning of the accused and the accused’s responses show a knowing, intelligent, and voluntary consent to its admission).

126. *Davis*, 46 M.J. at 554. The military judge was satisfied that the accused knew what he was doing.

127. *See* *United States v. Care*, 18 C.M.R. 247 (C.M.A. 1969); MCM, *supra* note 5, R.C.M. 910.

128. *See* *United States v. Clevenger*, 42 C.M.R. 895 (A.C.M.R. 1970) (holding that a policy which affirmatively encourages an accused to forsake his right to plead guilty for purposes of expediency is improper).

129. *Davis*, 46 M.J. at 556.

130. The other option, of course, is to contest the charges. In dissent, Judge Lucas adamantly raised the issue of ineffective assistance of counsel based on the defense counsel’s failure to present evidence on the merits. The practical reality of the defense counsel’s “total inaction,” in his opinion, deprived the accused of his right to due process and was contrary to public policy. *See id.* at 566 (Lucas, J., dissenting). In addition, like Judge Sullivan and the late Judge Wiss in *Weasler*, Judge Lucas took the view that validating the term will overshadow the majority’s cautions to practitioners. *Id.*

131. *See, e.g., id.* at 554; *United States v. Proffitt*, No. ACM 32316, 1997 WL 165434 (A.F. Ct. Crim. App. Apr. 4, 1997).

The Navy-Marine Corps Court of Criminal Appeals added one final case on pretrial agreement terms.¹³² In *United States v. Mitchell*,¹³³ the court reviewed a pretrial agreement that required the accused to repay \$30,733.62 to financial institutions that he defrauded.¹³⁴ At the time the accused proposed the restitution term in his pretrial agreement, he had returned to military custody from a five-and-one-half year period of unauthorized absence. During that time, he used his entrepreneurial skill to set up business opportunities in England and the Bahamas.¹³⁵ At trial, an officer and enlisted panel sentenced the accused to confinement for ten years, total forfeitures, and a dishonorable discharge. The pretrial agreement, in addition to requiring the restitution, provided that the convening authority would suspend all confinement in excess of sixty months.

While in confinement, the accused made partial restitution until his business ventures failed.¹³⁶ The convening authority then vacated the suspension pursuant to R.C.M. 1109.¹³⁷ The accused challenged the vacation based on indigence.

The Navy-Marine Corps court held that an accused who does not make full restitution pursuant to the term of a pretrial agreement is not deprived of the benefit of that bargain when a convening authority takes adverse action contemplated by the agreement. An important basis for the court's decision was the law of indigence and how it relates to an accused who makes partial restitution and then cannot complete the obligation because of changed circumstances. The court held that indi-

gence could operate to release an accused from a restitution obligation.¹³⁸ In military practice, old case law regarding indigence has changed only to permit relief from a restitution obligation if there has been "government-induced misconduct."¹³⁹ There was no misconduct under the facts of this case; hence, there was no legal basis to permit the accused to withdraw from a pretrial agreement that he proposed.¹⁴⁰

The key to the court's analysis is the new status of an accused and defense counsel in negotiating terms to a pretrial agreement. The court held that the accused proposed the term "at arms-length" and after full consultation with counsel.¹⁴¹ The accused was an "astute" individual who could "certainly [foresee] that his financial empire would suffer reversals during his time in confinement."¹⁴² The accused, moreover, told the convening authority and the military judge that he understood the term requiring restitution.¹⁴³ Finally, the court looked to the "four corners" of the pretrial agreement and the record and determined that the accused received other substantial benefit from the agreement.¹⁴⁴

Mitchell underscores that counsel need to be very careful in proposing and negotiating terms for an accused. In addition, public policy arguments are not given great weight, especially if the accused proposes the term and actions at trial indicate waiver. Counsel must also understand that indigence "through no fault of [the accused]" means exactly what it says. Unless there is "government-induced misconduct," indigence will not

132. Two other cases involving interpretations of pretrial agreement terms were also decided in 1997, but they are not discussed in this article. See *United States v. Villareal*, 47 M.J. 657 (N.M. Ct. Crim. App. 1997) (holding that the government's withdrawal from a pretrial agreement and then forwarding the case to a neutral convening authority did not amount to unlawful command influence); *United States v. Silva*, No. NMCM 95 01450, 1997 WL 652095 (N.M. Ct. Crim. App. May 14, 1997) (holding that a term requiring the accused to "waive all motions" violates neither the MCM nor public policy).

133. 46 M.J. 840 (N.M. Ct. Crim. App. 1997).

134. *Mitchell*, 46 M.J. at 842. The accused also entered guilty pleas to unauthorized absence, escape from confinement, forgery, making and uttering checks with insufficient funds, and possessing and altering military identification cards. *Id.* at 841.

135. The accused was also a successful college student.

136. *Mitchell*, 46 M.J. at 842.

137. *Id.* See MCM, *supra* note 5, R.C.M. 1109.

138. *Mitchell*, 46 M.J. at 842. See *United States v. Foust*, 25 M.J. 647 (A.C.M.R. 1987). Consequently, the accused's argument that R.C.M. 1113(d)(3) prohibited the convening authority from vacating the suspension because of indigence was misplaced. That provision only pertains to a situation where the convening authority is considering imposing confinement in lieu of a fine. See MCM, *supra* note 5, R.C.M. 1113(d)(3). An accused, upon a proper showing that it is impossible to pay the fine, can avoid imposition of confinement. *Mitchell*, 46 M.J. at 842.

139. *Mitchell*, 46 M.J. at 842.

140. The Navy-Marine Corps Court of Criminal Appeals indicated that this would result in a significant windfall for the accused. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* The convening authority agreed not to present evidence on charges related to desertion, conspiracy, other bad checks, and an unrelated unauthorized absence.

release an accused from the requirement to provide restitution as part of a pretrial agreement.

Gambling & Arson: Something New for the Military Judge

Review of the *Weasler-Rivera* line of cases is incomplete without a quick examination of the decisions involving the providence inquiry.¹⁴⁵ While the cases detail the need to establish a basis in law and fact to support a guilty plea, the primary focus is on the role of the military judge in the process and in some specific areas of UCMJ violations where soldiers have started committing more offenses.

In *United States v. Green*,¹⁴⁶ the Army Court of Criminal Appeals addressed what was required to support an accused's guilty plea to bad checks, the proceeds of which are used for gambling. The accused, knowing that he had no money in his checking account, wrote checks totaling \$850.00 at the post club. During the accused's providence inquiry, he told the military judge that he used some of the money to gamble at slot machines that were located in the post exchange. The military judge did not inquire further regarding how much money was spent on gambling.

On appeal, the accused argued that the public policy rule of *United States v. Allbery*,¹⁴⁷ regarding the courts' reluctance to assist with the enforcement of gambling debts, barred an Article 123a¹⁴⁸ conviction because the checks were written to facilitate an on-site gambling operation.¹⁴⁹ The Army court was forced, under this public policy bar, to affirm but modify the conviction, because the military judge failed to ascertain how much of the proceeds from the bad checks were used in the slot machines and how much time elapsed between cashing the checks and gambling.¹⁵⁰ The court held that, to negate the public policy that courts may not punish soldiers for check offenses arising from gambling debts, the providence inquiry or stipulation of fact must reflect what moneys were used for gambling and the character of the business activities of the check cashing facility.¹⁵¹ The court reversed the check specification dealing with the gambling because there were no facts in the providence inquiry that indicated that the post club did not cash the checks to facilitate on-site gambling.¹⁵²

In *United States v. Thompson*¹⁵³ and *United States v. Greenlee*,¹⁵⁴ the Army court directed its attention to the portion of the proceeds used for gambling or other purposes. In *Thompson*, the accused was convicted of four specifications of drawing and uttering worthless checks with intent to defraud; the four specifications represented forty-two checks totaling \$6457.60.¹⁵⁵ The facts indicated that the accused used \$10.00 of the proceeds

145. The court addressed the adequacy of a providence inquiry in a number of cases in 1997. Listed below are other cases the courts decided regarding factual predicates and pleas that may be important for practice. *See* *United States v. Willis*, 46 M.J. 258 (1997) (holding that the accused's guilty plea for the attempted murder of his uncle was provident under either transferred intent or concurrent intent theory); *United States v. Milton*, 46 M.J. 317 (1997) (holding that a guilty plea to assault by showing a concealed weapon and threatening victim with future harm if victim did not stay away from his wife was provident and constituted assault by offer); *United States v. Outhier*, 45 M.J. 326 (1996) (holding that a military judge must reopen providence and resolve a conflict between the facts and the plea where, in case of aggravated assault likely to cause death or grievous bodily harm, facts brought out during sentencing were inconsistent with plea); *United States v. White*, 46 M.J. 529 (N.M. Ct. Crim. App. 1997) (holding that pleas of guilty to larceny of basic allowance for quarters and variable housing allowance were provident where the accused admitted to knowing receipt of allowance delivered solely for purpose of defraying cost of civilian housing for accused and her dependents); *United States v. Ray*, 44 M.J. 835 (Army Ct. Crim. App. 1996) (holding that a plea to aggravated assault was provident, although the military judge failed to define "grievous bodily harm" and to discuss its meaning with the accused and failed to inquire into the accused's specific intent to inflict grievous bodily harm); *United States v. Thomas*, 45 M.J. 661 (Army Ct. Crim. App. 1997) (holding that the military judge committed reversible error in providence inquiry by misstating that force and lack of consent could be established by mere fact that sodomy victims were under age 16 and by failing to inquire into mistake of fact defense regarding consent of victims).

146. 44 M.J. 828 (Army Ct. Crim. App. 1996).

147. 44 M.J. 226 (1996) (applying the rules of *United States v. Wallace*, 36 C.M.R. 148 (1966)). *See* *United States v. Slaughter*, 42 M.J. 680 (Army Ct. Crim. App. 1995) (holding that check offenses are punishable under the UCMJ if there is no connection between the check cashing service and the gambling activity).

148. *See* MCM, *supra* note 5, pt. IV, ¶49.

149. *See Allbery*, 44 M.J. at 229.

150. *Green*, 44 M.J. at 830. The accused pleaded guilty to larceny and three specifications of making and uttering bad checks. The court reversed the finding on the one specification regarding making and uttering worthless checks at the check cashing facility in the post club. *Id.*

151. *Id.* The military judge must ask the accused, during the providence inquiry, or the stipulation of fact should indicate: whether all or a portion of the proceeds were used for purposes other than gambling; whether nongambling patrons were permitted to cash checks at the facility; what other services the check-cashing facility performed; and the hours of operation for both check cashing and gambling.

152. *Id.*

153. 47 M.J. 611 (Army Ct. Crim. App. 1997).

154. 47 M.J. 613 (Army Ct. Crim. App. 1997).

155. *Thompson*, 47 M.J. at 612 n.2.

of each of the three checks in question (which totaled \$50.00 each) for gambling. During the providence inquiry, the accused told the military judge that, after she cashed the checks, she did not intend to use all of the proceeds for gambling.¹⁵⁶ When the Army court originally considered the case, it held that the public policy protection was not triggered at all, since the accused did not, at the time she cashed the checks, intend to use all of the money for gambling.¹⁵⁷ On reconsideration, the court modified its earlier decision by holding that it was unfair to grant the accused full protection for the total amount of the checks. The court determined that the accused's intent at the time she cashed the checks was the place to draw the line of public policy protection.¹⁵⁸

In *Greenlee*, the Army court synthesized *Green* and *Thompson* into an intelligible rule for practitioners in gambling cases. Greenlee cashed forty-three worthless checks at various on-post clubs. For each \$150.00 check he wrote, he requested \$50.00 in quarters for gambling. During the providence inquiry, the accused disclaimed the *Allbery* public policy protection, although he acknowledged its existence.¹⁵⁹ The court held that \$50.00 of each check was covered by the *Allbery* public policy protection.¹⁶⁰ While the accused indicated that, subsequent to his initial use of the \$50.00, he might have used more of the proceeds for gambling, the Army Court of Criminal Appeals indicated that there was no protection for those proceeds. Applying the rules of *Thompson*, the *Allbery* protection only extends to proceeds of bad checks that the accused intended to use for gambling at the time worthless checks are cashed.¹⁶¹

The Army court cautioned practitioners, and particularly military judges, that in addition to ensuring that the providence inquiry reflects answers to the *Green* questions, the record

should also reflect "the exact nature of how an accused intended to use the proceeds at the time he or she cashed the worthless checks."¹⁶²

In *United States v. Peele*,¹⁶³ the government preferred charges against the accused for aggravated arson and damage to military property through neglect. The facts indicated that sometime between midnight and 0200, the accused entered his company dayroom, which contained combustible chemicals that workers temporarily stored there as part of a construction project. The accused kicked over a bucket of the flammable remodeling chemicals and threw books and papers onto the floor. He then set the mixture on fire with his cigarette lighter. He returned later to assist in extinguishing the fire, but not before the building was damaged.¹⁶⁴

Based on a pretrial agreement, the accused entered into a stipulation of fact and entered guilty pleas to simple arson and negligent damage of the same property. The accused acknowledged, in the stipulation of fact and during the providence inquiry, that he "willfully and maliciously" burned the building. He also acknowledged that, "through neglect," he damaged the same building through arson. The military judge, noting the "nonsequitur in the two pleas," quizzed the defense counsel to ascertain if the accused understood the apparent inconsistency with the plea.¹⁶⁵ The defense counsel replied that "that was how the appellant wanted to plead."¹⁶⁶ The trial counsel joined defense counsel in supporting the accused's plea. The appellant's use of the cigarette lighter to light the fire constituted the willful and malicious conduct supporting the arson offense.¹⁶⁷ Leaving the dayroom as the fire spread constituted the neglect supporting the damage to government property offense.¹⁶⁸ The military judge then accepted the accused's pleas.

156. *Id.*

157. *Id.*

158. *Id.* at 612.

159. *Greenlee*, 47 M.J. at 613. The accused stated that he was not entitled to claim the *Allbery* protection because he used a fraction of the proceeds of the worthless checks for gambling.

160. *Id.* at 613-15.

161. *See id.*

162. *Id.* at 615. The new "wrinkles" in the *Wallace/Allbery/Thompson* doctrine might require the CAAF to resolve how it is to be applied. It seems unfair to have a public policy against enforcement of gambling debts and then draw a line, although logical, at the intent at the time of the check cashing when actual proceeds of a worthless check are later used for gambling. Practitioners who desire to read a case where the military judge did everything right should consult *United States v. Hill*, No. 9600595 (Army Ct. Crim. App. June 6, 1997). For a complete discussion of *Wallace* and *Allbery* in the context of substantive criminal law, see Major William T. Barto, *Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice*, ARMY LAW., Apr. 1997, at 50, 58-60.

163. 46 M.J. 866 (Army Ct. Crim. App. 1997).

164. *Id.* at 867. The damage to the building was \$600.00.

165. *Id.* at 868. The military judge asked defense counsel, "You realize, of course, that you pled him guilty to willfully, maliciously, burning property, but through neglect he damaged it." *Id.*

166. *Id.*

The Army court, noting the responsibility of the military judge to inquire into the providence of the plea,¹⁶⁹ and of trial and defense counsel to ensure that the plea is consistent with law and regulation,¹⁷⁰ set aside the Article 108 offense. The court noted that the accused's acts of setting the fire and leaving the scene as the fire spread were both intentional acts.¹⁷¹ The military judge, therefore, should have rejected the pleas as improvident.

Most significant for military judges and practitioners is a footnote in the case that describes the difficult mission and precarious position of military judges. While the military judge erred in accepting the plea, the Army court stressed that counsel was also to blame.

[The military judge was] unfairly placed in the position by a staff judge advocate, trial counsel, and trial defense counsel who all erroneously believed that they could allow the [accused] to manipulate the facts in order to satisfy his desire to explain away misconduct to a less serious degree and thereby reduce the maximum period of confinement he was facing from ten years to one year.¹⁷²

Peele reminds military judges of the onerous task of establishing a factual predicate for the plea—the military judge acts as the final arbiter of the government's and defense's case. The military judge is often placed in an awkward position. Counsel must realize their importance to the system by not taking action in the name of an accused or in pursuit of a pretrial agreement that harm the system. In *Peele*, trial and defense counsel (and even the staff judge advocate, according to the court) were intent on working out a deal that suited expedience and the accused's interests.¹⁷³ Trial and defense counsel could have accomplished their interests without placing the military judge in an awkward position.¹⁷⁴

SOMETHING NEW (CONTINUED): COURT-MARTIAL PERSONNEL

More McKinney

The military justice action involving former SMA McKinney is perhaps the most famous case of the year in Army jurisprudence. Practitioners recall this action, not only because of the accused's identity, but because the issues in the case span many areas.¹⁷⁵ In *McKinney v. Jarvis*,¹⁷⁶ the Army Court of Criminal Appeals took another look at Articles 22, 23, and 1(9)¹⁷⁷ regarding convening authority disqualification in processing military justice actions.

167. *Id.*

168. *Id.* at 869. The military judge went through the elements of the arson offense and established a factual predicate for that plea. The military judge then proceeded to ask the accused about the element of neglect that was different from the arson offense. The military judge asked the accused, "I would gather that the neglect here was leaving the room with the fire still burning. Would you agree that that was neglect on your part?" The appellant stated in response, "Yes, Your Honor." It appears that defense counsel, desiring to secure the benefit of the bargain for the appellant, and trial counsel, desiring to make sure that the case proceeded without any hitches, sat silent at counsel tables.

169. *See generally* United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Clark, 26 M.J. 589 (A.C.M.R. 1988), *aff'd*, 28 M.J. 401 (C.M.A. 1989); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

170. *See generally* United States v. Watkins, 32 M.J. 527 (A.C.M.R. 1990).

171. *Peele*, 46 M.J. at 869.

172. *Id.*

173. *Id.* The court stated that an accused should not be permitted to admit guilt to a less serious offense that he did not commit in order to avoid pleading guilty to a more serious offense that appears to be supported by the total facts of a case.

174. The military judge most certainly could have rejected the plea and then would not have been in an awkward position. What this case illustrates is the "give-and-take" associated with courts-martial and trials in general. The parties to a trial depend on one another to conduct themselves not only consistent with procedural rules but also within the rules of professional courtesy. It is certainly reasonable for all of the parties to expect that an accused's guilty plea is consistent with law and regulation and that, if the plea is an odd one, counsel (and especially the defense counsel) know what they are doing. With this idea of "professional courtesy" in mind, the military judge's action of splitting the accused's conduct into intentional and negligent acts was reasonable.

175. Earlier, this article discussed the CAAF's fashioning of a new rule on closure in *McKinney v. Jarvis*, 47 M.J. 363 (1997). There has been much discussion in the press regarding *McKinney*, raising the issues of race and justice, treatment of officers versus treatment of enlisted soldiers in military justice, and the continuing disposition of adultery and sexual misconduct offenses in the military justice system.

176. 46 M.J. 870 (Army Ct. Crim. App. 1997).

177. Article 22(b) disqualifies an accuser from convening a general court-martial. UCMJ art. 22(b) (West 1995). Article 23(b) disqualifies an accuser from convening a special court-martial. *Id.* art. 23(b). Both provisions require a convening authority who is an accuser to forward a case to a superior competent authority. Both articles are dependent upon Article 1(9), which defines an accuser as a "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." *Id.* art. 1(9).

In *McKinney*, the accused asked for a writ of prohibition at the intermediate appellate court. The basis of the writ was that the SPCMCA should be disqualified from appointing an IO since the SPCMCA also preferred the charges.¹⁷⁸ For reasons not expressed in the opinion, the command withdrew preferential authority up to the SPCMCA level.¹⁷⁹ The accused also argued that the SPCMCA should be disqualified from further action in the case because of his position as both accuser and appointing authority.¹⁸⁰ The Army court's thorough opinion reviews the law of convening authority disqualification and should be a mainstay in every practitioner's trial notebook.¹⁸¹

Holding that the Article 32 IO appointment was proper and that the convening authority was not disqualified from further action in the case, the Army Court of Criminal Appeals noted that the *MCM* is clear regarding accuser disqualification. An accuser may not perform the following referral and post-referral duties: refer charges to¹⁸² or convene a general or special court-martial; act as a military judge in the same case,¹⁸³ act as a trial counsel or Article 32 IO;¹⁸⁴ act, at court-martial, as an interpreter, bailiff, reporter, escort, clerk, or orderly;¹⁸⁵ or perform the judge advocate review of a court-martial.¹⁸⁶ Conversely, an accuser expressly can: serve as defense counsel

with the consent of the accused;¹⁸⁷ forward charges to a superior commander for disposition; and convene and act as the summary court-martial of the same charges.¹⁸⁸ Rule for Courts-Martial 405(c) grants authority to convening authorities to appoint Article 32 IOs.¹⁸⁹ No *MCM* provision prohibits the appointment action of which the accused complained. Consequently, there was no express congressional or presidential intention to disqualify a convening authority who is an accuser from appointing an Article 32 IO.¹⁹⁰

In addressing the accused's argument that the SPCMCA had an "other than official interest"¹⁹¹ in the case by virtue of the fact that he was also the accuser, the court relied on two cases to hold that there was an absence of an "other than official interest." First, the court held that there was no logic to the argument that because the SPCMCA was the accuser, his preliminary review of the evidence was prejudicial to the accused.¹⁹² In *United States v. Wojciechowski*,¹⁹³ the SPCMCA stated, upon hearing that an accused was involved in additional allegations of drug distribution, that he was going to send the accused to a general court-martial.¹⁹⁴ In *McKinney*, the court followed *Wojciechowski*, indicating that, by the time a convening authority directs an Article 32 investigation, he believes a

178. *McKinney*, 46 M.J. at 871.

179. Withholding the authority to act in particular cases is a common practice. For example, a GCMCA will withhold authority to act in cases involving an officer or senior noncommissioned officer accused. This authority is at R.C.M. 306(a), which provides in part that: "[a] superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld." *MCM*, *supra* note 5, R.C.M. 306(a).

180. *McKinney*, 46 M.J. at 871.

181. The court also considered its authority to review this matter, since the case involved an issue at the Article 32 stage. In an almost identical analysis to that of *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996), the Army court held that the case was within its supervisory authority over Army courts-martial. See *McKinney*, 46 M.J. at 872-73.

182. *MCM*, *supra* note 5, R.C.M. 601(c).

183. UCMJ art. 26(d) (West 1995).

184. *MCM*, *supra* note 5, R.C.M. 502(d)(4)(A), 405(d).

185. *Id.* R.C.M. 502(e)(2)(A).

186. *Id.* R.C.M. 1112(c).

187. *Id.* R.C.M. 502(d)(4).

188. *Id.* R.C.M. 307(a), 1302(b). See *United States v. Kajander*, 31 C.M.R. 479 (C.G.B.R. 1962).

189. See *MCM*, *supra* note 5, R.C.M. 405(c).

190. See *McKinney v. Jarvis*, 46 M.J. 870, 875 (Army Ct. Crim. App. 1997). Additionally, the court indicates that it did not view R.C.M. 504(c)(1), 601(c), and 404(e) as disqualifying the SPCMCA from appointing an investigating officer. The court held that the appointment of an Article 32 IO is not a "disposition" of the charges. *Id.* It is merely a recommendation to the appointing authority that he or she will use to "discharge . . . responsibilities in determining how the allegations should best be disposed." *Id.* at 876 n.6 (quoting *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990)).

191. See UCMJ art. 1(9) (West 1995).

192. *McKinney*, 46 M.J. at 875-76.

193. 19 M.J. 577 (N.M.C.M.R. 1984).

general court-martial may be appropriate to dispose of the case.¹⁹⁵

Moreover, the SPCMCA had an official interest in the case by virtue of the official acts exception of Article 1(9).¹⁹⁶ Since 1952, courts have determined the existence of an other than official interest by exploring “whether, under the particular facts and circumstances . . . a reasonable person would impute to [the accuser] a personal feeling or interest in the outcome of the litigation.”¹⁹⁷ In an affidavit, the SPCMCA disavowed anything but an official interest in the case. The affidavit was enough for the Army court to hold that the SPCMCA performed “a command function embraced or reasonably anticipated” in processing court-martial actions.¹⁹⁸

The two most important parts of the opinion, however, address the withholding of action from subordinate to higher levels of command and the court’s interpretation of *United States v. Nix*.¹⁹⁹ As noted earlier, the command preferred charges at the SPCMCA level due, in part, to the accused’s status as the SMA and the attendant publicity. Withdrawal of preferential authority from subordinate commanders to the SPCMCA level ensured that an experienced commander with many years of service and wisdom by virtue of rank determined appropriate disposition.²⁰⁰

The court cautioned, however, that trial counsel and military justice managers must give great consideration to withdrawal actions. In *McKinney*, withdrawal “tied the hands” of the SPCMCA regarding his power to take certain actions. After becoming the accuser, the SPCMCA lost his authority to refer the case to a special court-martial.²⁰¹ While the SPCMCA retained his

authority to dispose of the matter through summary court-martial and nonjudicial proceedings, these alternatives could not be pursued without the SMA’s consent and would not result in discharge or confinement.²⁰² The only action the SPCMCA could take without the SMA’s consent was to dismiss the charges.²⁰³ In the routine case, withdrawal of preferential authority will not have a negative impact on the process. In high profile cases, however, there may be some desire to dispose of a matter quickly at the lowest level. Withdrawal of authority to act may create additional steps in processing.

The court also held that, while the convening authority could forward the charges to higher authority for disposition, he was required to note his disqualification.²⁰⁴ In doing so, the court reinterpreted *Nix*. In *Nix*, the accused was charged with maltreating subordinates, wrongful use of marijuana, and consensual sodomy. The SPCMCA had previous dealings with the accused, having ordered him to cease all contact with a woman the SPCMCA would later marry.²⁰⁵ Part of the accused’s relationship with the SPCMCA’s future spouse included engaging in “sexual bantering” and “sexual innuendo.”²⁰⁶ The SPCMCA, upon receipt of the charges against the accused, forwarded them to the GCMCA without noting his disqualification. Formerly, *Nix* was interpreted to mean that a disqualified convening authority is precluded from making any recommendation regarding the disposition of a case. In *McKinney*, however, the Army Court of Criminal Appeals held that the type of disqualification determines whether a convening authority can make a recommendation on disposition.²⁰⁷ A personal disqualification like that in *Nix* precludes a convening authority from making a recommendation on disposition. Conversely, a statutory disqualification, like that involved in

194. *Id.* at 578.

195. *McKinney*, 46 M.J. at 875. “[A] subordinate convening authority who directs an Article 32 investigation is not required to be absolutely neutral and detached. By ordering such an investigation, he has already determined that the offenses possibly merit a general court-martial. It is the investigating officer who must be impartial.” *Id.* (quoting *Wojciechowski*, 19 M.J. at 579).

196. *See* UCMJ art. 1(9).

197. *See generally* *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952). *See also* *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979).

198. *McKinney*, 46 M.J. at 876.

199. 40 M.J. 6 (C.M.A. 1994).

200. This is just my opinion. No conclusions regarding the *McKinney* case were coordinated with the staff judge advocate or the command that processed the case.

201. *See McKinney*, 46 M.J. at 875.

202. *See id.*

203. *See id.* The SPCMCA could have forwarded the action to the GCMCA, but the court was concerned with the potential impact of the withdrawal up to the SPCMCA on future action at the SPCMCA level. *Id.*

204. *Id.*

205. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

206. *Id.*

McKinney, would permit a convening authority to make a recommendation.²⁰⁸

One Potato, Two Potato: Ruiz, Lewis, and Panel Selections

Convening authorities must use the Article 25 criteria to select members.²⁰⁹ In selecting members, a convening authority cannot exercise “institutional bias . . . to achieve a particular result.”²¹⁰ The systematic exclusion or inclusion of a particular group that is unrelated to the Article 25 criteria violates the law.²¹¹ Two 1997 cases deal with issues involving panel selection and further clarify this area of the law for practitioners.

In *United States v. Ruiz*,²¹² the Air Force Court of Criminal Appeals had to consider whether it was proper for a convening authority to exclude from selection personnel from the accused’s medical group command. The court also considered whether the convening authority used rank as a criterion for selecting members. The accused was charged with adultery and fraternization.²¹³ When the case was presented to the convening authority for panel selection, he was informed that members of the accused’s medical group were excluded from consideration.²¹⁴ The staff judge advocate took this action because medical group personnel “would know appellant and some might be

familiar with the case or have discussed the case.”²¹⁵ In addition, when the convening authority rejected senior ranking individuals from the list of nominees, he asked for replacement nominees of the same rank.²¹⁶ The resulting panel consisted of five commanders, a vice-commander, and a deputy commander. The ranks consisted of four lieutenant colonels, three majors, and three captains.²¹⁷

The Air Force court held that the convening authority’s actions were entirely proper under Article 25 and case law.²¹⁸ In doing so, the court upheld the proposition that a convening authority has the power to include a cross-sectional representation, or in this case, a balance of ranks, on the panel.²¹⁹ The lesson for practitioners is that the government should provide strong support for the convening authority’s action. The convening authority testified that he believed that the exclusion of the medical group was a “good idea” because it eliminated the possibility of having people on the panel who were “too close to the case.”²²⁰ The convening authority also testified that his intent was to produce a balance of ranks on the panel. When the accused raises an issue involving improper panel selection, the government has a heavy burden to produce “clear and positive” evidence that an improper selection did not occur.²²¹ *Ruiz* demonstrates the quantum and character of evidence necessary to carry the government’s burden of proof.²²²

207. *McKinney*, 46 M.J. at 875 n.5.

208. A statutorily disqualified convening authority is precluded from subsequent action. It stands to reason, therefore, that a commander who is the victim of an offense or the person who issued an order that the accused chose to disobey may have an “other than official interest” in the matter and is both statutorily and personally disqualified. It is arguable whether the commander is only statutorily disqualified, but it may be asking too much to have that commander prefer charges. In this situation, trial counsel should have another officer in the command prefer the charges.

209. *See* UCMJ art. 25 (West 1995).

210. *United States v. Beehler*, 35 M.J. 502, 503 (A.F.C.M.R. 1992).

211. *See* UCMJ art. 25 (providing the criteria for panel selections). A commander must make selections based on judicial temperament, experience, training, age, length of service, and education. *Id.*

212. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 510-11.

219. *See generally* *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988) (holding that cross-sectional representation of military community on court-martial panel is permissible, though not constitutionally required); *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (holding that there is no Sixth Amendment right to a cross-sectional representation of the military community on a panel). The Court of Military Appeals has held that a “cross-sectional” representation of ranks on a panel is permissible. *See United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986).

220. *Ruiz*, 46 M.J. at 511.

221. *See United States v. Smith*, 27 M.J. 242 (C.M.A. 1988); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986); *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975); *United States v. Beehler*, 35 M.J. 502 (A.F.C.M.R. 1992). *See also United States v. Loving*, 41 M.J. 213 (1994), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

Similarly, *United States v. Lewis*²²³ addressed the quantum of evidence necessary to sustain an improper selection motion. In *Lewis*, the accused was charged with attempted voluntary manslaughter, assault, and aggravated assault on his wife, who was also a service member.²²⁴ The original convening order consisted of ten members, five of whom were females. When defense counsel requested enlisted members,²²⁵ the convening authority relieved two female officers from the panel and added one female enlisted member. The final panel consisted of five males and four females.²²⁶

As support for its improper selection motion—allegedly, the panel was improperly stacked with female members—the defense offered the following evidence: a listing of all of the general and special courts-martial at the base; a unit strength report that indicated that there were 2347 enlisted members in the unit, of which 342 were female; a unit strength report that indicated that there were 195 officers, 28 of whom were female; and witness testimony that the high percentage of female membership on the panel was an anomaly.²²⁷

In order to support a motion for improper selection based on systematic exclusion or inclusion, a party must show the pool of members available and eligible to serve as court members.²²⁸ The accused was not able to meet this test in *Lewis* because the statistics did not indicate what percentage of officer and enlisted personnel were disqualified or unavailable. Moreover, the list of courts-martial detailing the number of females who

sat on cases, particularly sexual misconduct cases where the victim was a female, according to the CAAF, only showed that women routinely sat on courts-martial.²²⁹ The CAAF found that the case was an anomaly and that there was no improper stacking of female members.²³⁰

Lewis indicates that, while the government has a difficult burden of proof in an improper selection motion, the defense has an equally tough burden. Merely presenting information to the fact-finder without meaningful interpretation likely will not constitute sufficient evidence. In addition, the defense counsel, for reasons not apparent in the opinion, did not call to the stand the noncommissioned officer who actually prepared the nominee action in the case.²³¹ The “clear and positive” evidence standard demanded of the government does not absolve defense counsel of the requirement to provide a sufficient evidentiary basis for motions regarding selection of members.

*Substantial Compliance and Forum Selection:
United States v. Turner*

Last year, in *United States v. Mayfield*,²³² the CAAF held that a court-martial composed of a military judge alone was not deprived of jurisdiction because the military judge failed to specifically obtain an accused’s oral or written request for trial by military judge alone on the record.²³³ A military judge could properly hold a post-trial Article 39(a) session to correct the

222. The military judge did a superb job of permitting counsel liberal questioning of the convening authority and the staff judge advocates involved. The Air Force Court of Criminal Appeals indicated that testimony on this issue took up 78 pages of the record of trial. The military judge also made extensive findings of facts. See *Ruiz*, 46 M.J. at 510-11. Since the government is held to a strict liability (clear and positive proof) standard for these types of motions, it is incumbent upon the trial counsel to present as much evidence as possible to withstand appellate review. See *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991).

223. 46 M.J. 338 (1997).

224. *Id.* at 339

225. *Id.* The defense counsel’s response was excellent and should be included in the defense practitioner’s list of options for this type of situation. Requesting enlisted members would, hopefully, produce a more balanced panel because, as the defense may have thought, more men would potentially be detailed. If that did not occur and the same amount of females were detailed as enlisted members, the defense would have some evidence that females were being detailed to achieve a particular result. The opinion does not reflect whether the defense made this specific argument in support of the motion.

226. *Id.* at 339.

227. *Id.* at 340. The sergeant in charge of preparing the lists of nominees for courts-martial testified. The staff judge advocate also testified. The sergeant who actually prepared the list of nominees *did not* testify. The military judge considered an affidavit from the GCMCA.

228. *United States v. Loving*, 41 M.J. 213 (1994), *aff’d on other grounds*, 116 S. Ct. 1737 (1996).

229. *Lewis*, 46 M.J. at 342.

230. *Id.*

231. In his concurrence, Judge Sullivan discusses this defense failure. He indicates that this inaction estopped the accused from raising the issue on appeal. *Id.* at 324 (Sullivan, J., concurring). Judge Sullivan notes one of the trends prevalent in recent pretrial and trial procedure cases, particularly those that discuss pleas and pretrial agreement cases. He states that “[a]n accused must make some hard choices at a court-martial and must live with the consequences of these choices in the appellate process.” *Id.* These hard choices often translate into waiver.

232. 45 M.J. 176 (1996).

233. *Id.* at 177.

deficiency. The CAAF reasoned that such action did not violate Article 16²³⁴ because the record indicated that it was “certainly clear”²³⁵ to all the parties that even though there was a change in military judges, the accused’s actions indicated his desire to proceed to trial with that new military judge. In *Mayfield*, the military judge simply forgot to obtain the forum request on the record before proceeding with the guilty plea inquiry.²³⁶ What then, would be the appropriate thing to do if the *defense counsel*, on behalf of the accused, made an oral request for trial by military judge alone on the record and no post-trial session was held to obtain the accused’s forum election? The CAAF answered this question in *United States v. Turner*.²³⁷

In *Turner*, a military judge alone in a contested court-martial found the accused guilty of sodomy, assault, indecent acts with a child, and attempting to impede an investigation.²³⁸ The military judge advised the accused of his forum rights in a pretrial session two months before trial on the merits. At that time, the accused deferred the decision on forum selection. Just before entering pleas and trial on the merits, the military judge conferred with defense counsel and obtained a written military judge alone request that only defense counsel signed.²³⁹ The

defense counsel then orally confirmed the forum choice on the record.²⁴⁰

The Navy-Marine Corps Court of Criminal Appeals held that, under *Mayfield*, the request was defective. While the CAAF in *Mayfield* held that Article 16 was violated when the military judge failed to initially obtain from the accused a written or oral request for a judge alone trial, there was in fact such a request obtained in the post-trial Article 39(a) session.²⁴¹ The rule of *United States v. Dean*,²⁴² which requires strict compliance with Article 16, deprived the *Turner* court-martial of jurisdiction. The Navy-Marine Corps court correctly noted that in *Mayfield* the CAAF did not overrule *Dean*; it applied an expansive interpretation of what actions constitute compliance with Article 16.²⁴³

The CAAF was equally adept in *Turner* and held that, although there was a technical Article 16 violation, the request substantially complied with the statute based on a totality of the circumstances.²⁴⁴ The CAAF concluded that the record was clear that reversal was not required because the accused did not suffer any prejudice from the technical Article 16 violation. The military judge properly advised the accused of his forum

234. See UCMJ art. 16(1) (West 1995). In a military judge alone court-martial, the accused must make an oral or written request for forum on the record before the court is assembled. *Id.* The accused must be aware of the identity of the military judge and consult with defense counsel before making the forum request. *Id.* *Mayfield* raises the issue of how the accused’s knowledge of the identity of the military judge fits into the analysis. The CAAF did not discuss this component of Article 16 in *Mayfield*.

235. *Mayfield*, 45 M.J. at 178.

236. See *id.* at 177. The opinion indicates that the accused submitted “pretrial paperwork” that contained a request for trial by military judge alone, but this paperwork was never attached to the record of trial. The opinion of the Navy-Marine Corps Court of Criminal Appeals indicates that this “pretrial paperwork” was not a formal request for trial by military judge alone, and, in any event, because defense counsel signed the request instead of the accused, it was ineffective under Article 16. See *United States v. Mayfield*, 43 M.J. 766, 768-70 (N.M. Ct. Crim. App. 1996).

237. 47 M.J. 348 (1997). For a complete discussion of the jurisdiction issue in *Turner*, see Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., Apr. 1998, at 1.

238. *Turner*, 47 M.J. at 348. The military judge sentenced the accused, a chief warrant officer, to dismissal and confinement for nine years.

239. *United States v. Turner*, 45 M.J. 531, 532 (N.M. Ct. Crim. App. 1996). The written request was: “Please accept this as notice that the accused had authorized me to state that he will select judge alone as the forum for the aforementioned case. CWO2 Turner has been advised of his rights to trial by members, and has knowingly, voluntarily, and intelligently waived trial by members.” *Id.* at 532 n.3.

240. See *id.* The discussion between the military judge and defense counsel was:

TC: Sir, I believe the defense has provided a written request for judge alone. Would you like to add that to the record or orally take care of that?
MJ: We can add that to the record.
TC: Judge, we can take care of that orally, if you prefer.
MJ: I have it, and I’ll mark that Appellate Exhibit VII [sic]. Any other documents?
MJ: Lieutenant Seacrist, I take it from this request that the decision has been made to go judge alone?
DC: Yes, sir.

Id.

241. See UCMJ art. 39(a) (West 1995).

242. 43 C.M.R. 562 (C.M.A. 1970).

243. For a general discussion of the relationship between *Dean* and *Mayfield*, see Coe, *supra* note 3, at 38-39. The key fact in the CAAF’s analysis was the post-trial Article 39(a) session, which the court said was appropriate under R.C.M. 1102(d). See MCM, *supra* note 5, R.C.M. 1102(d).

244. *United States v. Turner*, 47 M.J. 348 (1997).

rights. The accused deferred decision on forum, and defense counsel followed that deferral, after consulting with the accused, with a written request that indicated the accused's intentions. The defense counsel, in the presence of the accused, presented the written request to the court. It was appended to the record of trial. The accused then sat idly by while the defense counsel confirmed the oral request on the record.²⁴⁵ Based on the CAAF's review of applicable case law, the accused intentionally waived his right to personally write or make an oral forum request on the record.

Like *Mayfield*, *Turner* reflects the CAAF's inclination to dispose of court personnel issues based on practicality, rather than on the technical application of statutes. The trend, started in *United States v. Algood*,²⁴⁶ has reached fruition in *Mayfield* and *Turner*. So, practitioners do not have to guess about the CAAF's position on issues in this area. *Turner* also cautions military judges and counsel that Article 16 is still very important to the court-martial process. A military judge must diligently continue to inform an accused of his forum rights and to obtain either a written or oral waiver of forum from the accused on the record.²⁴⁷

*Waiver, Replacement of Military Judges, and Judicial
Restraint: United States v. Kosek*

In *United States v. Kosek*,²⁴⁸ the accused was charged with possession and use of cocaine. After his general court-martial was assembled, he asked the military judge to suppress his confession based on a violation of his Article 31 rights.²⁴⁹ The mil-

itary judge granted the motion, and the government appealed under Article 62.²⁵⁰ The Air Force Court of Criminal Appeals reversed the military judge's ruling. The CAAF then set aside the Air Force court's reversal and directed that the case be returned "to the military judge for reconsideration of [his] ruling."²⁵¹ Before the case was returned for reconsideration, the original military judge was reassigned as an appellate military judge.

A new military judge reconsidered the original ruling and then reconvened the court-martial.²⁵² He informed the accused of his forum rights and offered the accused the opportunity to execute a challenge for cause against the military judge.²⁵³ The accused declined. The new military judge then heard the motion and denied relief. The military judge found the accused guilty and sentenced him to a bad-conduct discharge, confinement for fourteen months, total forfeitures, and reduction to the lowest enlisted grade.²⁵⁴ The surprised accused appealed, arguing that the replacement was improper under R.C.M. 505(e)(2).²⁵⁵

The CAAF noted that when it set aside the Air Force court's decision reversing the military judge's suppression ruling in favor of the accused, it contemplated that the original military judge would reconsider the motion. An Article 62 appeal, the court stated, "necessarily involves an ongoing court-martial."²⁵⁶ Under R.C.M. 505(e)(2), since the court-martial had been assembled, replacement of the military judge could only occur upon a showing of good cause.²⁵⁷ In addition, the CAAF indicated that the accused could have challenged the military judge based on disqualification under R.C.M. 902.²⁵⁸ There was no

245. *Id.* at 351 (Sullivan, J., concurring). Concurring in the result, Judge Sullivan took the position that there was no Article 16 violation at all. Under federal law, Judge Sullivan wrote, "[c]ommon sense must prevail." *Id.* Ostensibly, when the accused sat as the defense counsel entered the written request and confirmed it orally, that substantially complied with *all* of the requirements of Article 16.

246. 41 M.J. 492 (1995) (looking at the practical effect of referring a case to trial using members selected by a previous commander of an installation that was deactivated under the Base Realignment and Closure Program).

247. *See Turner*, 47 M.J. at 350.

248. 46 M.J. 349 (1997).

249. *See* UCMJ art. 31 (West 1995).

250. *See id.* art. 62 (providing that the government may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact that is material in the proceedings).

251. *Kosek*, 46 M.J. at 350.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* Rule for Courts-Martial 505(e)(2) provides that, after assembly, a military judge may only be replaced for good cause shown. MCM, *supra* note 5, R.C.M. 505(e)(2). "Good cause" includes "physical disability, military exigency, and other extraordinary circumstances which render[s] the . . . military judge unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life." *Id.*

256. *Kosek*, 46 M.J. at 350.

need, however, for the court to delve into that analysis because the accused and counsel waived the opportunity to challenge the military judge.²⁵⁹

Kosek is important because it illustrates that defense counsel must always attack an accused's cause with foresight and ingenuity. Probably very few counsel have ever confronted the issue of replacement in a context similar to *Kosek*. The lesson to be learned from *Kosek* is that waiver must be considered regardless of the posture of the case. The accused's and defense counsel's waiver of the opportunity to challenge the military judge gave the CAAF an easy "avenue of approach" toward judicial restraint. Since 1988,²⁶⁰ the cases that even indirectly interpret military judge replacement rules concern disqualification under R.C.M. 902.²⁶¹ No case resolves whether a military judge's reassignment as an appellate military judge constitutes a good cause under R.C.M. 505(e)(2) to warrant replacement with another judge in an ongoing court-martial.²⁶²

SOMETHING BORROWED: PEREMPTORY CHALLENGES
The CAAF Strikes Purkett: United States v. Tulloch

In *United States v. Tulloch*,²⁶³ the Army Court of Criminal Appeals held that when a peremptory challenge is made and an opposing party makes a credible challenge that fully disputes the explanation offered to support the challenge, the moving party must come forward with an additional explanation that does more than "utterly fail to defend it as non-pretext."²⁶⁴ The accused in *Tulloch* pleaded guilty to possessing and transporting a firearm and to usury. An officer and enlisted panel found him guilty of attempted robbery and conspiracy, contrary to his pleas. During voir dire, the defense counsel focused on the junior member of the panel, who was also a member of the same race as the accused. The defense counsel established that the junior member, at least from her responses, would be impervious to unlawful coercion in voting on the findings.²⁶⁵ The government used a peremptory challenge against the member because she "seemed to be blinking a lot; [and] seem[ed] uncomfortable."²⁶⁶ When the defense counsel further challenged the government's reason, the military judge sustained trial counsel's reason, relying on the trial counsel's "forthright[ness]" with the court in the past.²⁶⁷ The Army court set aside the findings, holding that the proffered reasons were not sufficient to support the peremptory challenge under *Batson v. Kentucky*.²⁶⁸ The court also held that the military judge erred

257. *Id.* See MCM, *supra* note 5, R.C.M. 505(e)(2) and (f).

258. See *Kosek*, 46 M.J. at 350. See also MCM, *supra* note 5, R.C.M. 902 (providing the specific and general bases for disqualification of military judges).

259. *Kosek*, 46 M.J. at 350.

260. See *United States v. Hawkins*, 24 M.J. 257 (C.M.A. 1987) (holding that an accused who failed to voir dire and to object to a new military judge, and executed a military judge alone request which included the replacement judge's name, could not claim on appeal that the replacement was improper, notwithstanding that there was no explanation given for the replacement).

261. See, e.g., *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding that the military judge should have disqualified himself when, even after placing the matter on the record and permitting voir dire, he indicated that he was the next door neighbor of, and his daughter was a close friend of, the child-victim of an assault and burglary that was pending before the court-martial).

262. The only case on point is *Hawkins*, 24 M.J. 257 (C.M.A. 1987), and the primary discussion concerns the time in a court-martial (after assembly) when a "good cause" basis is required to support replacement of a military judge. *Hawkins* also does not directly address R.C.M. 505(e)(2). See MCM, *supra* note 5, R.C.M. 505(e). Rather, it addressed UCMJ art. 29(d), which concerns the proper procedure for presenting evidence when a military judge is replaced. UCMJ art. 29(d) (West 1995).

263. 44 M.J. 571 (Army Ct. Crim. App. 1996).

264. *Id.* at 575.

265. *Id.* at 573. The following colloquy occurred between the defense counsel and the member:

DC: Staff Sergeant E, you're the junior member of this panel, obviously, by the rank that you have. If you believe, at the end of the government's case, that they have not met—that they have failed to prove their case beyond a reasonable doubt and that, therefore, Private Tulloch was not guilty, and every other panel member disagreed with you and thought him to be guilty, would you, nevertheless, vote not guilty—

SSG E: Yes.

DC:—or could you be swayed to turn because of everybody else?

SSG E: No.

DC: So if you believe he was not guilty, no rank could influence you to change your vote?

SSG E: [Negative response.]

Id.

266. *Id.* at 575.

267. *Id.*

268. 476 U.S. 479 (1986).

when he used the trial counsel's past forthrightness as a basis to sustain the peremptory challenge.²⁶⁹

The issue in *Tulloch* concerns the impact of *Purkett v. Elem*²⁷⁰ in the military justice system. In *Purkett*, the Supreme Court appeared to return to pre-*Batson* times when it upheld a Missouri prosecutor's peremptory challenges against two black men because he "did not like the way they looked," "they looked suspicious," and one of the jurors had "long, unkempt hair, a mustache, and a beard."²⁷¹ Would the trial counsel's reason in *Tulloch* be sufficient and permissible under *Purkett*?²⁷²

Affirming the Army court's opinion, the CAAF completely negated the impact of *Purkett* in the military justice system. The court held that once a convening authority selects an individual under the Article 25 criteria as best qualified to serve on a panel, a trial counsel may not exercise a peremptory challenge against that individual based on a reason that is "unreasonable, implausible, or that otherwise makes no sense."²⁷³

The CAAF's route to that holding is important. First, the CAAF distinguished the source of the right, in the military jus-

tice system, to be tried by a panel "from which no cognizable racial group ha[d] been excluded."²⁷⁴ The Court of Military Appeals recognized, in *United States v. Santiago-Davila*,²⁷⁵ that the equal protection rules of *Batson* are not applicable to the military justice system through the Sixth Amendment, since the right to a jury trial does not apply to courts-martial under that Amendment.²⁷⁶ Rather, the rights created by *Batson* are applicable through the Due Process Clause of the Fifth Amendment.²⁷⁷ In *Santiago-Davila*, the Court of Military Appeals indicated that it would be inconsistent with the tradition of the armed forces, as a "leader in eradicating racial discrimination," not to apply *Batson* to the military justice system.²⁷⁸

Having established how *Batson* applies to the military justice system, the CAAF was forced to decipher why one of its progeny should not apply to it. Occasionally, the CAAF reminds practitioners that perhaps the most instructive case on why we do things differently than our civilian counterparts is *Parker v. Levy*.²⁷⁹ In *Parker*, the Supreme Court held that the offenses of conduct unbecoming an officer and gentleman, and disorders and neglects to the prejudice of good order and discipline, were not void for vagueness.²⁸⁰ The accused was on

269. *Tulloch*, 44 M.J. at 573, 575-76.

270. 115 S. Ct. 1769 (1995) (per curiam).

271. *Id.* at 1769.

272. The trial counsel's basis for the peremptory challenge was confusing at best. The trial counsel failed to relate how the member's blinking and uncomfortableness would affect the execution of duties as a panel member. *Purkett*, however, indicated that the basis for a peremptory challenge did not have to make sense.

The following colloquy occurred when the trial counsel made her peremptory challenge:

TC: A little overly eager, sir. I'm sorry. The government would challenge Staff Sergeant E, sir. And in anticipation of the *Batson* issue—

MJ: Yes?

TC: —the government's position is that it was Staff Sergeant E's demeanor when [defense counsel] questioned him about whether he would be influenced at all by other members of the panel, and just his demeanor, in general. I was observing him during voir dire, and he seemed to be blinking a lot; he seemed uncomfortable. The government's not challenging him at all based on his race.

MJ: And the fact that he's the junior member—does that have any bearing?

TC: No, sir, it does not.

MJ: Okay.

Tulloch, 44 M.J. at 573.

273. *United States v. Tulloch*, 47 M.J. 283, 287 (1997)

274. *Id.*

275. 26 M.J. 380, 389-90 (C.M.A. 1988).

276. *Id.* at 390. See generally *United States v. Hutchinson*, 17 M.J. 156 (C.M.A. 1984); *United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978).

277. See *Tulloch*, 47 M.J. at 285. See also *United States v. Moore*, 26 M.J. 692 (C.M.A. 1988).

278. See *Santiago-Davila*, 26 M.J. at 380. In *Tulloch*, the CAAF noted that the Army Court of Military Review did not apply *Batson* to Army courts-martial because of a history of discrimination in Army justice. Rather, the Army court believed that "the use of stereotypes for any purpose within the court-martial system" had to be avoided. *Id.* at 390.

279. 417 U.S. 733 (1974). In a 1996 concurring opinion in *United States v. Eberle*, Judge Sullivan reminded practitioners of the importance of *Parker*. See 44 M.J. 374 (1996) (Sullivan, J., concurring) (holding that the offense of indecent acts encompassed the conduct of an accused who physically forced female victims to participate by restraining them as he masturbated, ejaculated, and fondled their breasts).

280. *Parker*, 417 U.S. at 753-57.

notice, therefore, that his conduct of making public statements to black Americans that they should disobey orders to go to Vietnam and referring to Special Forces personnel as “liars and thieves,” “killers of peasants,” and “murderers of women and children” were offenses under the UCMJ.²⁸¹ The hallmark of the opinion, however, was the Court’s recognition that “the military is, by necessity, a special society separate from civilian society.”²⁸² With regard to military law, the Court stated that “[j]ust as military society has been a society apart from civilian society, so [m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”²⁸³ In *United States v. Moore*,²⁸⁴ the Army Court of Criminal Appeals borrowed, and the Court of Military Appeals affirmed, this analysis to distinguish why *Batson* ought to apply to the military justice system without the requirement that the party objecting to a peremptory challenge provide sufficient evidence of institutional discrimination by the party exercising a peremptory challenge.²⁸⁵

The Army court provided the following justifications for why *Batson* applies differently in the military justice system: courts-martial are not subject to the jury trial requirements of the Constitution; military accused are tried by a panel of their superiors, not by a jury of their peers; military panel members are selected by a convening authority on a best-qualified basis and are not drawn from a random cross-section of the community; military counsel are provided with only a single peremptory challenge, in contrast to the numerous peremptory challenges permitted by most civilian jurisdictions; and in civilian jurisdictions, the numerous peremptory challenges are used to “select” a jury, but in courts-martial, a peremptory challenge is used to eliminate those who are already selected by the convening authority.²⁸⁶ Considering these distinguishing features, the CAAF concluded that *Purkett* could only apply to civilian

jurisdictions because it reflected the Supreme Court’s sensitivity that “there are virtually no qualifications for jury service—instinct necessarily plays a significant role in the use of peremptory challenges to ensure that both the [g]overnment and the accused are able to present the case to jurors capable of understanding it and rendering a fair verdict.”²⁸⁷

In dissent, Judge Sullivan indicated that the government stated the basis for its peremptory challenge with enough specificity to satisfy *Batson*.²⁸⁸ In a more strongly worded dissent, Judge Crawford condemned the majority for departing from Supreme Court precedent without adequate justification.²⁸⁹ She indicated that there was no reason to apply a different rule, let alone even apply *Batson* to the military justice system, because there was no historical evidence that unlawful discrimination was employed in the exercise of peremptory challenges.²⁹⁰

Instead of focusing on the selection process and the convening authority’s choice of the “best qualified” individuals to serve on panels, Judge Crawford focused on the trial attorneys themselves.²⁹¹ The military legal corps and the military communities where they practice are relatively small in comparison to civilian communities. Everyone knows everyone. It is both difficult and foolish, in Judge Crawford’s opinion, for a judge who is living in such a small and close community to mask a peremptory challenge based on race or gender. Also, Judge Crawford pointed to the fact that the case law is replete with the validation of peremptory challenges based on “hard” (actual bias) and “soft” (hunches) data.²⁹² The government’s basis for the peremptory challenge here was demeanor, a soft data justification that is normally permissible. Finally, Judge Crawford took issue with the Army court’s adoption and the majority’s affirmance of a requirement that the military judge make factual findings when the parties dispute the factual predicate for a

281. *Id.* at 756-57.

282. *Id.* at 743.

283. *Id.* at 744.

284. 26 M.J. 692 (A.C.M.R. 1988).

285. The Court of Military Appeals affirmed *Moore*. See *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). A military judge resolves *Batson* objections using a three-step process: the opposing party must object to establish a prima facie case of unlawful discrimination; the moving party must come forward with an explanation that does not have to be persuasive or plausible, but must be a facially race-neutral explanation; and the military judge must then decide whether the accused has proven purposeful racial discrimination. *Id.* In civilian jurisdictions, there may be a requirement for the objecting party to provide a history of institutional discrimination in order to proceed with the objection.

286. See *United States v. Tulloch*, 47 M.J. at 285 (quoting *Moore*, 26 M.J. at 700).

287. *Id.* at 287.

288. *Id.* at 289 (Sullivan, J., dissenting).

289. *Id.* (Crawford, J., dissenting).

290. See *id.* at 292.

291. See *id.*

292. See *id.* at 293 nn.5-8 (listing the hard and soft data cases).

peremptory challenge. This was a primary basis for the Army court's reversal of the accused's conviction. Judge Crawford indicated that the CAAF never imposed such a requirement on military judges at the time of the Army court's ruling.²⁹³

Tulloch teaches practitioners that, in addition to having a clear mind during voir dire to collect information for the intelligent exercise of causal challenges, *trial counsel* must also pay closer attention to soft data bases for peremptory challenges. A trial counsel will prevail on a peremptory challenge only upon stating a clear and unambiguous race-neutral reason.

*The Goose, the Gander, and the Defense:
United States v. Witham*

What is good for the goose is good for the gander . . . and the defense counsel. In *United States v. Witham*,²⁹⁴ the companion case to *Tulloch*, the CAAF formally affirmed the Navy-Marine

Corps Court of Criminal Appeals' determination that gender is an impermissible basis for the exercise of a peremptory challenge.²⁹⁵ In addition, the CAAF held that the *Georgia v. McCollum*²⁹⁶ rule, which applies *Batson* to the defense in state and federal civilian proceedings, is equally applicable to military defense counsel.

In *Witham*, the defense counsel sought to peremptorily challenge the only female member from the panel.²⁹⁷ The military judge denied the request after establishing that defense counsel based the challenge on the fact that the member was a female.²⁹⁸

The CAAF easily disposed of the defense's arguments that *Batson* should not be applicable to the defense. The appellant challenged application of *Batson* to the defense on three grounds: (1) the accused is not a state actor; (2) the accused should not suffer for the government's past discrimination in peremptory challenges; and, (3) peremptory challenge is the only way for the accused to affect panel composition.²⁹⁹ This

293. Judge Crawford referred to *United States v. Perez* as support for the majority's general proposition. *Id.*, citing *United States v. Perez*, 35 F.3d 632 (1994). In *Perez*, the accused and several co-accuseds, all having Spanish surnames, were charged with drug conspiracy. During jury selection, one of the first twelve names drawn was Ruth Santiago. After a sidebar conference, the government exercised a peremptory challenge against Ruth Santiago. The government's basis for the challenge was that Ruth Santiago worked in the inner city as a receptionist at a public housing authority and could have been exposed to drugs. In response to the government's reason, the trial court stated, "I understand," and sustained the peremptory challenge. The U.S. Court of Appeals for the First Circuit held that the challenge was based on "something other" than race and was valid under *Batson*, but noted that even after the district judge made that finding, *the defense continued in its disagreement*. *Perez*, 35 F.3d at 636. The court also held that, in such situations, a trial court should "state whether it finds the proffered reason for a challenged strike to be facially race neutral or inherently discriminatory and why it chooses to credit or discredit the given explanation." *Id.* Such a procedure "fosters confidence in the administration of justice without racial animus . . . eases appellate review of a trial court's *Batson* ruling . . . [and] ensures that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal." *Id.* While the CAAF may not have expressly required this procedure, it appears that such a procedure is implicit in the duties of a trial court and implicit in the three-step analysis which the Army court announced and the Court of Military Appeals affirmed in *United States v. Moore*, 26 M.J. 692, 701 (A.C.M.R. 1988).

294. 47 M.J. 297 (1997), *petition for cert. filed*, 62 Crim. L. Rep. 3132 (U.S. Jan. 14, 1998). The accused was charged with making a false official statement and filing a false travel claim. The officer and enlisted panel acquitted the accused of kidnapping and rape.

295. *Id.* at 300. See *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) (holding that gender is a suspect classification under *Batson* and that a trial should be free from "state sponsored" group stereotypes). One can quibble with this part of the CAAF's holding. In holding that *J.E.B.* applies to courts-martial, the CAAF stated that it has "repeatedly held that the *Batson* line of cases . . . [of which *J.E.B.* is a part] applies to the military justice system." *Witham*, 47 M.J. at 300. The problem with that assertion is that *J.E.B.* postdates all of the cases that the CAAF cited as extending the *Batson* line of cases. Moreover, practitioners who follow the cases know that the CAAF might opine that a specific case does not appropriately apply in a court-martial context. *Tulloch* is a perfect example.

296. 505 U.S. 42 (1992) (holding that a criminal defendant may not engage in purposeful racial discrimination in the exercise of a peremptory challenge).

297. *Witham*, 47 M.J. at 299-300. During voir dire, the defense established that Staff Sergeant H, the member in question, had previously been held up at gunpoint and knew, but did not socialize with, the alleged victim of the rape. She indicated that the sex of a witness would not influence whether she believed the witness' testimony. The opinion indicates that the defense counsel was playing the "numbers game" in an attempt to achieve a number of panel members that would favor the defense on voting during panel deliberation. After the military judge denied the peremptory challenge against the lone female member, the defense exercised its challenge against another member, which reduced the panel to six members. This required four votes for conviction. The military judge permitted the defense to withdraw its peremptory challenge, increasing panel membership to seven, which required five votes for conviction.

298. *Id.* at 299.

TC: Your Honor, in light of the fact that the victim's sex is female and the member being challenged is female, the Government would ask that the defense be required to show a—some type of a reason other than—

MJ: Are you talking about the *Batson* case and so on—

TC: Yes, sir. *McCullum*, I believe, is the authority.

MJ: Is there anything—I'm sorry. Did the sex of Staff Sergeant Haynes—for the record, she is female. Did that enter into your decision to preempt?

DC: Yes, it did sir.

Id.

299. See *id.* at 301.

was in stark contrast to the government's ability, through panel selection, to pick and to choose who it wanted on the panel.

Responding to the "state actor" argument, similar to *McCullum*, the CAAF held that the accused does not have a constitutional right to a peremptory challenge. Rather, the accused exercises that right based on a statute, Article 41, and that right is not absolute.³⁰⁰ The exercise of a peremptory challenge involves the military judge, who must discharge the challenged member. If an accused is permitted to exercise a peremptory challenge based on gender discrimination, he essentially uses the state apparatus to effect that purpose. In *McCullum*, the Supreme Court specifically prohibited the defense from using the state to advance unlawful discrimination in the exercise of a peremptory challenge.³⁰¹ The CAAF dismissed the other arguments based on unfairness by indicating that, while the convening authority does influence the membership on the panel, selections must be consistent with the congressional intent embodied in Article 25. A convening authority who chooses members bases those selections not on personal considerations but on official statutory criteria.³⁰²

Contrary to *Tulloch*, the CAAF held that the rules of *Parker* did not reveal a "military exigency or necessity" that created a need to apply a different rule of peremptory challenges to the defense.³⁰³ The Article 36³⁰⁴ requirement to adopt rules of pro-

cedure used in the federal courts, where practicable, was appropriate for this situation.³⁰⁵

Like *Tulloch*, *Witham* communicates that defense counsel must also employ excellent advocacy skills in the exercise of a peremptory challenge. One can view the defense counsel in *Witham* as a victim of inartful questioning. The defense counsel was placed in a "catch-22" when the military judge asked him the pregnant question whether gender played a role in his decision to exercise his peremptory challenge. The interesting thing about this case is that there was adequate foundation to support a challenge for cause.³⁰⁶ If the defense counsel had a better plan for the challenges phase of trial, perhaps he would have used some of the information from voir dire to support the peremptory challenge.

An Incomplete Circle: Batson Odds and Ends

Two other 1997 cases involving *Batson* deserve comment. In *United States v. Clemente*,³⁰⁷ the accused, a Filipino, pleaded guilty to attempted larceny, larceny, and stealing and opening mail.³⁰⁸ After voir dire, the government used its peremptory challenge against the only Filipino member of the panel.³⁰⁹ The defense counsel objected and requested that the military judge require the government to state a basis for the challenge.³¹⁰ The

300. See UCMJ art. 41 (West 1995) (providing one peremptory challenge to each the defense and the government). The statute also describes the rules in using peremptory and causal challenges when panel membership is reduced below a quorum.

301. See *Witham*, 47 M.J. at 302.

302. *Id.* at 302-03.

303. *Id.* at 302.

304. UCMJ art. 36.

305. In concurrences, Chief Judge Cox and Judge Efron specifically referenced this basis for the opinion, noting that the opposite conclusion was required in *Tulloch* "to address the unique role of the [g]overnment in shaping the composition of a court-martial panel." *Witham*, 47 M.J. at 303 (Efron, J., concurring). Chief Judge Cox once again stated his opinion that the government has an unlimited number of peremptory challenges and, thus, an unfair advantage over the defense. *Id.* at 304 (Cox, C.J., concurring).

306. See *id.* at 299. The member knew the victim from "prior interactions" and had been previously held up at gunpoint. Another issue that *Witham* indirectly raises is the potential application of the dual motivation analysis doctrine to the military justice system. That doctrine provides that when two reasons are given in support of a peremptory challenge and one of the reasons is purposely discriminatory, in violation of *Batson*, the peremptory challenge is valid despite a discriminatory purpose if the juror would have been struck anyway for the non-discriminatory purpose. See *Wallace v. Morrison*, 87 F.3d 1271 (11th Cir. 1996). In *Morrison*, the U.S. Court of Appeals for the Eleventh Circuit held valid a prosecutor's exercise of peremptory challenges based on the fact that jurors were black Americans and on his gut reaction after assigning each juror a numerical number after their responses to his voir dire questions. *Id.* The prosecutor stated that black jurors did not tend to get lower scores by virtue of their race. *Id.* See generally *Howard v. Senkowski*, 986 F.2d 24 (1993); *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252 (1977). But see *State v. King*, 572 N.W.2d 530 (Wis. 1997) (holding that a prosecutor's peremptory challenge based on the fact that jurors were "older" and "female" violated *Batson* because the gender reason was impermissible). The Wisconsin court refused to follow the federal dual motivation analysis rule. What would have occurred in *Witham* if the defense counsel stated that the basis for the peremptory challenge was gender and the fact that the member was held up at gunpoint and knew the victim? The way the case law is at present, a military judge would commit prejudicial error by issuing a ruling consistent with *Wallace*. The Court of Military Appeals expressly prohibited dual motivation justifications in *United States v. Green*. See *Green*, 36 M.J. 274 (C.M.A. 1993) (holding that explanations for peremptory challenges cannot be viewed in the disjunctive for *Batson* purposes if one of the explanations offered patently demonstrates an inherent discriminatory intent).

307. 46 M.J. 715 (A.F. Ct. Crim. App. 1997).

308. *Id.* at 716.

309. *Id.* at 719.

government explained that the member had leave scheduled during the court-martial, and the military judge, over defense objection, upheld the trial counsel's race-neutral explanation. The defense counsel failed to request additional voir dire of the challenged member, and on appeal, the defense asserted that the government justification was a pretext for intentional race-based discrimination in violation of *Batson*.³¹¹

The Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in ruling that the peremptory challenge complied with *Batson*.³¹² The court described the assignment of responsibilities in raising and justifying a *Batson* objection. The court held that, while a party exercising a peremptory challenge has the responsibility to give a race-neutral reason to support the challenge, the objecting party still has the burden of persuasion to establish purposeful discrimination.³¹³ The military judge's responsibilities do not include a sua sponte duty to question a challenged member regarding a peremptory challenge. When the defense counsel failed to request additional voir dire of the member, he waived the *Batson* objection. *Clemente* is instructive in communicating to defense counsel the need to conduct additional voir dire in *Batson* issues so that all relevant information is on the record and available to the military judge for use in deciding the objection.

In *United States v. Ruiz*,³¹⁴ the Air Force court held that when a military judge considers a *Batson* objection based on gender, the per se rule of *United States v. Moore*³¹⁵ is not always applicable.³¹⁶ The rule in *Moore* provides that a prima facie case of discrimination is established once an opposing party makes a *Batson* objection.³¹⁷ In *Ruiz*, the government exercised its peremptory challenge against the only female member of the panel. The defense objected to the challenge, citing the then very recent case *J.E.B. v. Alabama ex. rel. T.B.*³¹⁸ Noting that *Batson* only applied to race-based peremptory challenges, the military judge did not require the government to state a gender-neutral reason.³¹⁹

The Air Force court, in holding that the military judge acted consistent with the per se rule of *Moore*, reasoned that the per se rule specifically applied to *Batson*-type challenges where the government exercised its peremptory challenge against a member of the accused's race.³²⁰ The court acknowledged that gender "can be used as a pretext for racial discrimination,"³²¹ but also held that there are situations where application of the per se rule would produce absurd results.³²² One of those situations is gender in a military justice system.

The Air Force court viewed *J.E.B.* as a direct response to problems only prevalent in a civilian jurisdiction.³²³ The court

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. 46 M.J. 503 (A.F. Ct. Crim. App. 1997).

315. 28 M.J. 366, 368 (C.M.A. 1989). The per se rule of *Moore* relieves an objecting party in a *Batson* situation from providing extrinsic evidence of intentional discrimination. Once the *Batson* objection is made, the party who made the peremptory challenge must articulate a supporting race-neutral reason.

316. *Ruiz*, 46 M.J. at 508.

317. *Moore*, 28 M.J. at 368.

318. 511 U.S. 127 (1994).

319. *Ruiz*, 46 M.J. at 506. *Ruiz* was tried in an overseas location, and this made it difficult for the parties to obtain a copy of the case. The Air Force court stated that the overseas location had "limited research materials available." *Id.* The military judge was not aware of *J.E.B.* and directed counsel to locate a copy of the case and return the following morning. Neither party could obtain a copy of the case. The government's reason for the peremptory challenge, however, was that the member was a contracting officer. The trial counsel concluded that contracting officers held the government to a very high standard of proof. *Id.*

320. *Id.* at 508.

321. *Id.* at 506.

322. *Id.* at 508. The court indicated the absurdity of applying *Batson-Moore* to a peremptory challenge of a male in a predominantly male court, where the accused is a male; but this is not as absurd as the Air Force court indicates. See, e.g., *Fritz v. State*, 946 S.W.2d 844 (Tex. 1997). In *Fritz*, the Texas Court of Criminal Appeals holds that a prosecutor may not exercise a peremptory challenge (seven challenges of male jurors) based on the fact that the jurors are the same sex (male) and approximately the same age (under 30) as the defendant and would share a potential bias and shared identity with the defendant. *Id.* The jurors were dismissed based on their sex and because of stereotypes associated with young men, exactly what *J.E.B.* was designed to prevent. This is a civilian case, but it is conceivable that trial or defense counsel may desire to strike based on the fact that the panel member is a male and in a particular age group.

323. *Ruiz*, 46 M.J. at 507. The court pointed out that there is a different procedure for juror selection in civilian jurisdictions and that civilian juries must represent a cross section of society.

found that in a court-martial the composition of the panel is more likely to reflect the military society and community.³²⁴ Normally, there will never be more than a handful of females, if any, on a panel because females make up fewer than twenty percent of the military population.³²⁵ The court concluded that, when the government makes a peremptory challenge based on gender, the societal composition of the military supports that the challenge was exercised in good faith.³²⁶ The court reasoned that the Supreme Court in *J.E.B.* recognized the need for a prima facie case of intentional discrimination in gender situations before a party is required to explain the basis for a peremptory challenge.³²⁷ The Air Force court said that trial judges, based on their experience, would be able to decide whether a gender-neutral reason is necessary on a case-by-case basis.³²⁸

Ruiz is an interesting decision, and practitioners must remember that the Air Force court issued it before the CAAF decisions in *Tulloch* and *Witham*. On one hand, its reasoning is sound because it recognizes that gender might be viewed differently from race in a predominantly male military society. On the other hand, the court's dichotomy of race and gender in the application of the *Moore* per se rule appears to be an unauthorized reversal of established military case law. Permitting military judges to choose when to require a gender-neutral reason in *Batson* situations has the capacity to produce additional litigation and inconsistent results. The opinion continues the incomplete circle of *Batson's* application to the military justice

system by establishing yet another wrinkle in its implementation.³²⁹

SOMETHING BLUE . . . A DIRGE FOR OVERUSE OF THE IMPLIED BIAS DOCTRINE

A new partnership can be happy, even though the partners disagree. Such was the situation on the CAAF in deciding how and when to apply the implied bias doctrine in causal challenges. The implied bias doctrine operates to prohibit a member from sitting on a panel when, based on that member's implicit bias, retaining the member on the panel would cause substantial doubt as to the legality, fairness, and impartiality of the proceeding.

In 1996, the CAAF applied the implied bias doctrine in *United States v. Fulton*.³³⁰ Using the "catch-all" provision of R.C.M. 912(f)(1)(N),³³¹ the CAAF held that a military judge did not abuse his discretion in denying a challenge for cause against a member who was the chief of security police operations and also held bachelors and masters degrees in criminal justice.³³² Chief Judge Cox wrote the majority opinion, in which Judges Crawford and Gierke joined. Judge Sullivan strongly dissented based on *United States v. Dale*,³³³ a case in which Judge Crawford dissented based on her disagreement with the court's movement toward a per se rule against law enforcement personnel serving as court members.³³⁴

324. *Id.*

325. *Id.* at 506.

326. *Id.* at 508. The facts of *Ruiz* involve a government peremptory challenge. The opinion, however, applies to "either party." *Id.*

327. *Id.*

328. *Id.* at 509.

329. See Captain Denise J. Arn, *Batson: Beginning of the End of the Peremptory Challenge?*, ARMY LAW., May 1990, at 33; Lieutenant Colonel James A. Young, *The Continued Vitality of Peremptory Challenges in Courts-Martial*, ARMY LAW., Jan. 1992, at 20; Colonel (Ret.) Norman G. Cooper and Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of Batson v. Kentucky and Its Progeny?*, ARMY LAW., Oct. 1992, at 10; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Eugene R. Sullivan and Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141 (1996). In my opinion, the peremptory challenge is a mainstay of the American legal system. There will be a significant passage of time before one can talk about a serious movement to abolish it.

330. 44 M.J. 100 (1996). See Coe, *supra* note 3. The member in *Fulton* had contact with the convening authority only on matters involving "high level decisions" that did not include the accused's misconduct. *Id.*

331. MCM, *supra* note 5, R.C.M. 912(f)(1)(N). This rule provides that a member may be challenged for cause and removed when it is clear that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." *Id.* This provision embodies both the actual and implied bias standards. Actual bias is when a member indicates that some belief or situation will prevent him from performing duties on a panel. Successful rehabilitation resolves an actual bias issue. Implied bias is raised by status or implicit bias resulting from some belief or previous activity which would cause substantial doubt as to the legality, fairness, and impartiality of the proceeding if the member were retained on the panel. Implied bias operates to exclude a member, even if the member is "successfully" rehabilitated after disavowing the implied bias. The *appearance* of fairness determines whether a challenge for cause based on implied bias is granted.

332. *Fulton*, 44 M.J. at 100-01.

333. 42 M.J. 384 (1995) (holding that a member represented "the embodiment of law enforcement" based on his position as deputy chief of security police and his practice of attending the "cops and robbers" briefing for the base commander).

334. *Id.* at 386.

Four months after *Fulton*, the CAAF decided *United States v. Daulton*.³³⁵ In *Daulton*, the accused was charged with indecent acts on children. The CAAF reversed the accused's conviction, holding that the military judge erred by refusing to grant a challenge for cause against a member whose sister was the victim of child sexual abuse.³³⁶ The member's sister was the same age as the accused's victim when the sexual abuse occurred.³³⁷ Both Judges Sullivan and Crawford dissented from that part of the majority opinion regarding implied bias.³³⁸ The CAAF considered the 1997 implied bias cases against this backdrop.

*Vixens, Married OSI Agents,³³⁹ and "More Money":
United States v. Minyard*

In *United States v. Minyard*,³⁴⁰ the accused was charged with seven specifications of larceny and wrongful appropriation of an American Express Card.³⁴¹ During voir dire, an officer member stated that she was married to the Office of Special Investigations agent who investigated the case against the

accused. The member indicated that she and her husband "don't discuss cases."³⁴² She also stated that she may have heard her husband make a reference to the case in a telephone conversation.³⁴³ The defense made a challenge for cause based on implied bias.³⁴⁴ The military judge denied the challenge, and the CAAF reversed the conviction.³⁴⁵

The CAAF concluded that the military judge abused his discretion in denying the challenge for cause. The court reiterated that the standard of review for causal challenges based on actual bias is one of credibility, and military judges are given great deference in making this determination.³⁴⁶ On appeal, causal challenges are reviewed for an abuse of discretion. Regarding causal challenges based on implied bias, the court reiterated that an objective standard applies. The relevant question is whether a reasonable member of the public would have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings.³⁴⁷

The CAAF held that there would be substantial doubt about the legality, fairness, and impartiality of the proceeding if this

335. 45 M.J. 212 (1996). Aside from the challenge issues, the CAAF reversed Daulton's conviction because the accused was denied his Sixth Amendment right to confrontation when he was excluded from the courtroom during the victim's testimony, although he was permitted to observe by closed-circuit television. *Id.*

336. *Id.* at 217-18.

337. *Id.* at 218. The member's responses in voir dire indicated that she was shocked when she found out that her grandfather had sexually abused her sister. Regarding her duties as a member, she indicated that she "believed" she could separate the incident from the case. *Id.* She also indicated that the incident "shouldn't" have a bearing on the case. She finally stated that she would have no difficulty sitting as a member in the case. *Id.* Judge Gierke wrote the majority opinion. Chief Judge Cox and Senior Judge Everett concurred.

338. *Id.* at 220-25. Judge Sullivan opined that, since the defense counsel did not base the challenge for cause on implied bias, the majority's reliance on the objective standard in determining whether there was an abuse of discretion was misguided. *Id.* Since the challenge for cause was based on actual bias, the military judge made a credibility determination based on the member's responses to questions, and there was no abuse of discretion. Judge Crawford opined that the majority inappropriately substituted its judgment in an area where great deference is given to military judges. *Id.* Similar to Judge Sullivan, she concluded that the case involved actual bias. However, she saw the majority action as an improper extension of the implied bias doctrine because the case did not represent an "extreme situation." *Id.* at 221.

339. Office of Special Investigations (the Air Force operation that conducts criminal investigations).

340. 46 M.J. 229 (1997).

341. *Id.* at 230.

342. *Id.*

343. *Id.* The member described the circumstances and the phone call as follows:

It was a conversation on the telephone, but I don't know who he was talking to because I didn't answer the telephone when we were at home. He made a comment like "More money?" So, when he got off the phone, I said, "What are you talking about, 'more money?'" I didn't know who he was talking to. He said "Oh, it is a case that is being worked on. Somebody said that this guy took more money." That would be something that I might associate with this case.

Id.

344. *Id.* at 233. The trial counsel responded that the agent would likely not testify. In fact, it appears that the agent did not testify. The military judge denied the challenge for cause after making a credibility determination that the member's responses were "significantly direct and sincere" and "I don't see a challenge for cause . . . based on the fact that she is the spouse of that particular agent." *Id.* at 230-31.

345. *Id.* at 230.

346. *Id.* See *United States v. White*, 36 M.J. 284 (1993) (holding that a military judge has wide latitude in determining the scope and conduct of voir dire and must be given the same latitude in deciding challenges, since the military judge has an opportunity to view the demeanor of a member and hear the member's responses to questions).

member sat in judgment of an accused investigated by her husband.³⁴⁸ The court stressed that the decision in no way questioned the member's integrity. Moreover, the decision should not be viewed as moving toward a per se rule disqualifying law enforcement personnel and their relatives from service on panels.³⁴⁹ Judges Sullivan and Effron, in a concurrence, indicated that they "would allow neither the fox nor the vixen to guard the hen house."³⁵⁰

Judge Crawford wrote a strong dissent, lamenting the decision as an improper extension of the implied bias doctrine.³⁵¹ Citing Supreme Court case law, Judge Crawford indicated that there has never been an instance in which that court has disqualified a juror based on implied bias.³⁵² In addition, Judge Crawford indicated that the majority opinion "undermined the practice of rehabilitation in [f]ederal, state, and military courts."³⁵³ The member, she stressed, emphatically indicated to the military judge that she would follow the court's instruction, keep an open mind, and lawfully weigh the evidence heard during trial. Equally important, Judge Crawford decried the fact that the member's husband never testified and there was no evidence other than the voir dire that he was involved in the investigation pertaining to the accused.³⁵⁴

While the dissent is quite strong, *Minyard* fits in the orderly progression of law dealing with causal challenges and law enforcement personnel. In *Fulton* and *Dale*, the CAAF told practitioners that challenges for cause involving law enforcement personnel would be reviewed on a case-by-case basis.

Practitioners were also told that the CAAF was still sorting out this issue. *Minyard* indicates that the CAAF has sorted out its plan of attack. There is no per se rule regarding law enforcement personnel or their relatives. As Judges Sullivan and Effron stated in *Minyard*, "[w]e are talking about 'the' policeman and 'his' wife."³⁵⁵

*"Where goest thou"³⁵⁶ With Implied Bias?:
Lavender and Youngblood*

*United States v. Lavender*³⁵⁷ and *United States v. Youngblood*³⁵⁸ contain the CAAF's latest statement on the application of implied bias. Both cases indicate the course the CAAF has charted for this doctrine.

In *Lavender*, the accused pleaded guilty to larceny, forgery, making and uttering bad checks, and wrongfully charging personal phone calls to the government.³⁵⁹ During deliberations on findings, one of the panel members informed the president, in the presence of all of the members, that twenty dollars was stolen from her purse. That member-victim then informed the military judge, who held an Article 39(a) session to determine any possible impact on the deliberations.³⁶⁰ The military judge questioned the members about the impact of the larceny, and all of the members indicated that they could still execute their responsibilities fairly. During the course of the questioning, however, another member indicated her belief that money was taken from her purse as well.³⁶¹ This member also indicated

347. See MCM, *supra* note 5, R.C.M. 912(f)(1)(N).

348. *Minyard*, 46 M.J. at 231.

349. See *id.* It is interesting to note that Judge Crawford, while supporting the result in *United States v. Napoleon*, stated in a concurrence that the holding should be based only on actual bias. *Id.* at 233-35 (Crawford, J., dissenting). See *Napoleon*, 46 M.J. 279 (1997) (holding that, under the actual and implied bias standards, the military judge properly denied a challenge for cause against a member who had *official* contacts with a special agent-witness, who was "very credible because of the job he has" and gained knowledge of the case through a staff meeting).

350. *Minyard*, 46 M.J. at 232.

351. *Id.* (Crawford, J., dissenting).

352. *Id.* at 234 (citing *Smith v. Phillips*, 455 U.S. 209 (1982); *Dennis v. United States*, 339 U.S. 162 (1950); *United States v. Wood*, 299 U.S. 123 (1936)).

353. *Id.*

354. *Id.* at 235.

355. *Id.* at 232. One can also view *Minyard* as an example where the military judge did not employ an abundance of caution in deciding the challenge. Military judges are supposed to use the *Moyar* mandate to liberally grant challenges for cause. See *United States v. Moyar*, 24 M.J. 635, 638, 639 (A.C.M.R. 1987). Judge Crawford indicated, without citing to the case, that this would avoid many issues. *Minyard*, 46 M.J. at 235.

356. *Minyard*, 46 M.J. at 235 (Crawford, J., dissenting). Judge Crawford asked the majority where they intend to take the implied bias doctrine.

357. 46 M.J. 485, *cert. denied*, 118 S. Ct. 629 (1997).

358. 47 M.J. 338 (1997).

359. *Lavender*, 46 M.J. at 486.

360. *Id.*

that the theft would have no impact on her as a member. The defense counsel's voir dire consisted of recalling one of the victim-members to ask if the member knew when the money was taken.³⁶²

The defense challenged the entire panel for cause. The rationale for the challenge was that all of the panel members knew about the alleged larceny and would hold it against the accused during sentencing once they found out that the accused earlier pleaded guilty to larceny.³⁶³ The military judge denied the challenge, and the accused appealed based on the implied bias doctrine.

The CAAF did not apply the implied bias doctrine because the facts did not constitute "a rare exception."³⁶⁴ The CAAF stated that the rare exception is illustrated by *Hunley v. Godinez*,³⁶⁵ a burglary and robbery case in which a jury should have been excused after the trial judge determined that some of them were victims of a burglary similar to the one that was being tried.³⁶⁶

Applying *Hunley* to *Lavender*, the CAAF held that implied bias does not apply to reverse a conviction when: the defense counsel conducts limited voir dire and does not inquire into prejudicial information that the panel might have; panel members do not "stand in the same shoes as the victim" (panel member larcenies occurred under different circumstances than the accused's taking and forging checks from the checkbook of a

woman with whom he was living); the offenses the accused commits are not intimidating (here, the panel members were victims of a theft of unattended property, not murder); affected panel members are removed from panel duties; and, the crime did not affect the remaining panel members (the accused was found guilty of the lesser included offense). The CAAF stated that the implied bias doctrine applies to the most rare circumstances. Judge Crawford concurred, noting that she would apply a different standard for the implied bias doctrine.³⁶⁷ Judge Effron concurred, expressing disagreement with the limitation of the implied bias doctrine to rare cases. He noted the structural differences between the military justice system and civilian jurisdictions in selecting members/jurors, number of peremptory challenges available, and the liberal grant mandate for causal challenges.³⁶⁸

Judge Effron's concurrence, however, proved to be quite important in *Youngblood*,³⁶⁹ a case involving unlawful command influence. In *Youngblood*, the accused was convicted of wrongful distribution and use of LSD, larceny of military property, and wrongfully altering military identification cards.³⁷⁰ Prior to *Youngblood*'s general court-martial, the three most senior panel members attended a staff briefing,³⁷¹ at which the general court-martial convening authority (GCMCA) and the staff judge advocate (SJA) indicated that commanders who disposed of military justice actions inconsistent with their beliefs might have difficulty progressing in the Air Force.

361. *Id.* at 487. The member indicated that the money could have been taken between 0800 and 1150. Two of the three enlisted members on the panel indicated their belief that the money was stolen from the purses during a morning break before lunch.

362. *Id.*

363. *Id.* The members might think that the appellant stole the money based on a similarity of facts, which indicated that the accused took a checkbook from a friend's purse, forged her signature on some of the checks, and then cashed them without his friend's permission. *Id.* The panel convicted the accused of the lesser included offense of wrongful appropriation and sentenced him to a bad-conduct discharge, partial forfeiture of pay for 24 months, and reduction to the lowest enlisted grade.

364. *Id.* at 488 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

365. 784 F. Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992). In *Hunley*, the accused was found guilty of burglary and murder. After an unforced entry into an apartment to steal items, he was surprised by the occupant, and he killed her with a kitchen knife. The jurors began deliberations on findings, were deadlocked, and terminated activities at 10:00 p.m. The jury was divided eight to four in favor of conviction. While the jurors were asleep in a sequestered hotel, someone entered their rooms with a pass key and stole the property of four of the jurors. All twelve jurors discussed the burglary. When deliberations resumed, the jury was no longer deadlocked. The jury delivered a unanimous conviction in less than one hour. The trial judge denied the defense request for a mistrial based on *in camera* proceedings where the jurors indicated that they were unaffected by the burglary. The trial judge also ruled that the strong evidence in the case decreased the likelihood that the burglary adversely affected the jurors. A federal district court reversed the state cases affirming the conviction, and the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's judgment. *Hunley*, 975 F.2d at 316.

366. *Hunley*, 975 F.2d at 320. The court applied the following factors to determine whether the implied bias doctrine should apply: whether the members were placed in the shoes of the victims; the similarity between the offenses; whether the issues in the cases were close; the status of the deliberations; and whether all jurors are notified of an event and whether they express concern over it. *Id.*

367. *Lavender*, 46 M.J. at 490. Judge Crawford would ask whether the military judge *clearly* abused his discretion, as opposed to whether there was an abuse of discretion. See *United States v. Napoleon*, 46 M.J. 271, 285 (1997). This is a much higher standard than the one the CAAF currently uses to review implied bias cases.

368. *Lavender*, 46 M.J. at 489-90.

369. *United States v. Youngblood*, 47 M.J. 338 (1997). This article discusses unlawful command influence only in the context of implied bias.

370. *Id.* at 338.

371. *Id.* at 339.

During voir dire, counsel and the military judge asked members who attended the briefing about the matters discussed. Member #1 indicated that the SJA's remarks indicated that a previous commander "underreacted and . . . shirked his or her leadership responsibilities" in handling and punishing a child abuser.³⁷² This member also stated that, with respect to the child abuse matter, the GCMCA indicated displeasure with that commander's handling of the case and "forwarded a letter to that commander's new duty location expressing the opinion that 'that officer had peaked.'" ³⁷³ This member also stated that he occasionally coordinated, after the fact, with the GCMCA regarding disciplinary matters to explain his actions.

Member #2 indicated that the SJA expressed an opinion that the commander who underreacted "should have been given an Article 15 for dereliction of duty."³⁷⁴ She reiterated that the GCMCA was in the process of contacting a former commander's gaining command to express that his career might not be a "lengthy one."³⁷⁵ Member #3 remembered the comments regarding a "letter to a former commander's superiors. He also interpreted the GCMCA's comments as being 'dissatisfied with the way things had happened.'" ³⁷⁶ All three of the members indicated that they could fairly discharge their responsibilities as panel members. The military judge granted the defense challenge for cause against Member #1, but denied the challenges to Members #2 and #3.

The CAAF indicated that cases involving unlawful command influence are the *Hunleys*³⁷⁷ of the military justice system. This and other command influence cases are different from the line of cases ending with *Lavender* because of the "subtle pressures" that a commander brings to bear on subordinates.³⁷⁸ A commander and an SJA act with the "mantle of authority."³⁷⁹ The CAAF held that the military judge failed to recognize that the "sword of Damocles was hanging over the heads" of the remaining members who attended the briefing.³⁸⁰ Implied bias is appropriate for unlawful command influence situations because "it is difficult for a subordinate [to ascertain] . . . the influence a superior has on that subordinate."³⁸¹

In another strong dissent, Judge Crawford questioned application of the implied bias doctrine to unlawful command influence.³⁸² Consistent with previous analyses, she noted that use of the implied bias doctrine was an affront to the rehabilitative process of court members and placed military judges in an awkward position of being second-guessed every time they exercise discretion under the wide latitude grant of *United States v. White*.³⁸³

While there still appears to be disagreement over when to use the implied bias doctrine,³⁸⁴ *Lavender* and *Youngblood* communicate valuable lessons for practitioners. *Lavender* teaches that the time for defense counsel to establish a basis for a challenge is at court-martial through voir dire. *Youngblood* is a caution to every SJA that, even in an age on enlightenment,

372. *Id.* at 340.

373. *Id.*

374. *Id.* at 340.

375. *Id.*

376. *Id.*

377. *See supra* notes 365-366 and accompanying text.

378. *See Youngblood*, 47 M.J. at 338. The CAAF cited *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986), to support this proposition and to communicate that eliminating unlawful command influence is a paramount concern in military justice. The CAAF has long recognized that the intent of a commander in making comments is not the important factor in deciding whether unlawful command influence was used in the military justice process. Rather, it is the message perceived by the listener. *See, e.g., United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984).

379. *See Youngblood*, 47 M.J. at 341. Member #1 indicated that the GCMCA stated "that we should use the SJA because he speaks for the Wing Commander." *Id.* *See generally Kitts*, 23 M.J. 105.

380. *Youngblood*, 47 M.J. at 342.

381. *Id.* (citing *United States v. Gerlich*, 45 M.J. 309, 313 (1996)).

382. *Id.* at 338, 343. Judge Sullivan concurred in part and dissented in part. He would have disposed of the case on an unlawful command influence analysis alone. Judge Crawford also noted that this case should be decided on the issue of unlawful command influence alone. She, however, did not see any unlawful command influence. *Id.* at 344-45 (Crawford, J., dissenting) (characterizing the commander's briefing as a general or informational course in military justice). This conclusion should puzzle experienced practitioners, as it does Judge Sullivan, considering the case law and the fact that the record was replete with GCMCA and SJA comments that could be perceived as unlawful command influence.

383. 36 M.J. 284 (C.M.A. 1993).

384. Judge Effron disagrees with the view that the implied bias doctrine applies only to rare cases. *See United States v. Lavender*, 46 M.J. 485, 489-90 (1997) (Efron, J., concurring).

unlawful command influence can still exist in a military environment. Controlling it is very difficult, but not impossible. *Youngblood* is also a reminder that there are some special circumstances where the law of challenges is applied differently—it is incumbent upon defense counsel to be creative in representing an accused's cause at trial.

Conclusion

“Something Old, Something New, Something Borrowed, and Something Blue”—this theme recognizes the new CAAF and places in context the trailblazing character of the recent pretrial and trial procedure cases. In pretrial procedures, the CAAF expanded the accused's rights at the Article 32 stage by granting a qualified right to an open investigation. In pretrial agreements, the CAAF reinforced its position that an accused who proposes, negotiates, and benefits from novel terms might be foreclosed from appellate relief. In court personnel cases, the CAAF reminded practitioners that the court will examine

issues based on their practical effect rather than through a technical application of statute. In voir dire and challenges, the court charted the course for the military justice system in the exercise of peremptory challenges and application of the implied bias doctrine.

A consistent theme in many of the cases, particularly the *Batson* and implied bias cases, is the recognition that the special nature of a military society demands application of a modified rule of law different from that imposed in civilian society. Where appropriate, however, the CAAF indicated that the military justice system is not so separate as to be unaffected by civilian case law. In fact, in a majority of the cases, the CAAF recognized the relevance of Article 36 and the requirement to adopt procedures of the federal district courts where practicable. While the CAAF did not answer all of the pretrial and trial procedure questions posed in 1997, practitioners have a bright beacon of light in many areas of the law to help them perform their military justice missions.